[redacted]

SUPREME COURT OF THE UNITED STATES.

[redacted]

COMMONWEALTH TRUST COMPANY OF PITTSBURGH, APPELLANT,

v.

MAX SMITH AND MARGARET SMITH.

[redacted]

[redacted]

(28,591)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 636.

COMMONWEALTH TRUST COMPANY OF PITTSBURGH, APPELLANT,

vs.

MAX SMITH AND MARGARET SMITH.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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1–5 In the United States Circuit Court of Appeals for the Ninth Circuit.

COMMONWEALTH TRUST COMPANY OF PITTSBURG, a Corporation, Trustee, Appellant,

vs.

MAX SMITH and MARGARET SMITH, Appellees.

TRANSCRIPT OF RECORD.

Upon Appeal from the United States District Court for the District of Idaho, Southern Division.

6 *Names and Addresses of Attorneys of Record.*

Richards & Haga,
Boise, Idaho;
A. N. Edwards,
St. Louis Mo.,
Attorneys for Appellant.

Turner K. Hackman,
Twin Falls, Idaho,
Attorney for Appellees.

7 In the District Court of the United States for the District of Idaho, Southern Division.

In Equity.

No. 743.

COMMONWEALTH TRUST COMPANY OF PITTSBURG, a Corporation, Trustee, Plaintiff,

vs.

MAX SMITH and JENNIE DOE SMITH, Defendants.

Bill of Complaint.

To the Honorable the Judges of the District Court of the United States for the District of Idaho:

The Commonwealth Trust Company of Pittsburgh, a corporation duly organized and existing under the laws of the State of Pennsylvania, as Trustee, brings this its Bill of Complaint, against the above named defendants, whose citizenship and residence are hereinafter particularly alleged, and thereupon complains and says:

I.

That plaintiff, Commonwealth Trust Company of Pittsburgh, now is and at all times herein mentioned was a corporation organized and existing under the laws of the State of Pennsylvania,
8 and is a citizen thereof, with its principal place of business in the City of Pittsburgh, County of Allegheny, in said State.

II.

That the defendants, Max Smith and Jennie Doe Smith, are husband and wife and citizens of the State of Idaho residing in Twin Falls County, said State. That the true name of said Jennie Doe Smith is to plaintiff unknown, and she is therefore herein designated as Jennie Doe, but plaintiff prays that when her true name is ascertained it may be substituted herein, and that she may thereafter be designated by her true name.

III.

That on or about the — day of August, 1907, the State of Idaho, through its State Board of Land Commissioners made application to the Secretary of the Interior of the United States under Section 4 of the Act of Congress approved August 18, 1894, commonly known as the "Carey Act," and the acts amendatory thereof, and the laws of the State of Idaho passed in furtherance of the said Acts of Congress, for segregation from the public domain and donation or grant to said State of approximately 127,707.29 acres of desert land situated in Twin Falls County, State of Idaho, which lands and other arid lands in the vicinity thereof, making in the aggregate about 150,000 acres, the State of Idaho represented could be irrigated and reclaimed as contemplated by the said Acts of Congress from
9 the surplus and unappropriated waters of Salmon River by means of a storage reservoir on said river with an available storage capacity of about 180,000 acre feet, and by tunnels, canals, flumes, ditches and laterals to carry and conduct such water from said reservoir and river to, over and upon the said desert lands. That prior to making said application to the Secretary of the Interior for segregation, the State Engineer of the State of Idaho and said State Board of Land Commissioners had determined, adjudged and decided, as required by the laws of the State of Idaho relating to such matters, that there was sufficient surplus and unappropriated water in said Salmon River, available for such purpose, to accomplish the reclamation of said lands to the extent and degree required by the said Acts of Congress; and the Secretary of the Interior in considering and approving said application and in segregating said lands from the public domain, did also, as p*ail*ntiff is informed and believes and so alleges the fact to be, determine and decide as required by said Acts of Congress, that said water supply was sufficient and the proposed irrigation system suitable for the reclamation of said lands, and the Secretary of the Interior, having determined the

sufficiency of said water supply and proposed irrigation system to properly reclaim said lands, did, on the 10th day of April, 1908, segregate from the Public Domain and agree to donate,
10 grant and patent to the State of Idaho, the said desert lands described in the application of the State of Idaho, and aggregating as aforesaid approximately 127,707.29 acres, the same to be irrigated and reclaimed from said water supply and water appropriations, and from the irrigation system described in said application and to be constructed by or under the supervision of the State of Idaho as contemplated by the said Acts of Congress and the laws of the State of Idaho relating to such matters.

IV.

That on or about the 30th day of April, 1908, the Twin Falls Salmon River Land & Water Company (hereinafter sometimes called the "Construction Company"), a corporation organized and existing under the laws of the State of Delaware and doing business in the State of Idaho, under and by virtue of a compliance with the laws thereof, entered into a contract with the State of Idaho, through its State Board of Land Commissioners, for the construction of said reservoir, tunnels, canals, ditches and other structures, (sometimes known as the Salmon River Project or Salmon River Irrigation System) and described in the application of the State to the Secretary of the Interior for the segregation of said lands, being the identical irrigation system theretofore approved by the State of Idaho and the Secretary of the Interior for the reclamation of said lands (sometimes known as Carey Act lands) and other
11 desert lands in the vicinity thereof, aggregating as aforesaid approximately 150,000 acres. That in entering into said contract, the Construction Company relied, as plaintiff is informed and believes and so alleges the fact to be, upon the determination by the State of Idaho and the Secretary of the Interior that the surplus, flood and unappropriated waters of the Salmon River, available for storage and distribution through said irrigation system, were ample and sufficient to reclaim said lands to the extent and degree required by the said Acts of Congress and the laws of the State of Idaho passed in furtherance thereof, and, relying upon the correctness and finality of said decisions and determinations, the Construction Company agreed by and in said contract of April 30, 1908, to accept as its sole compensation for constructing said irrigation system the lien authorized by said Acts of Congress to be created by the State of Idaho on and against said Carey Act lands, and the lien authorized to be created by the laws of the State of Idaho, particularly by what is now Section 3019 of the Compiled Statutes, 1919, of the State of Idaho, and the consideration that should or ought to be paid under said Acts of Congress and the laws of the State of Idaho, by entrymen and owners of such lands for an interest in said irrigation system and water rights. And it was determined by the State of Idaho and said Construction Company and agreed in said

contract that the actual cost of said irrigation works and
12 structures so to be built and constructed by the Construction Company, and other necessary expenses of reclamation and reasonable interest thereon, would be the sum of $40.00 per acre when apportioned or distributed equally over the whole 150,000 acres proposed to be reclaimed therefrom, and a lien was created by the State of Idaho under the authority vested in it by the said Acts of Congress in favor of the Construction Company for the actual cost and necessary expenses of reclamation and reasonable interest thereon, estimated at $40.00 per acre, against each and every legal subdivision segregated from the public domain under the Carey Act pursuant to the State's application as aforesaid.

And it was further provided in said contract that upon the payment of said sum of $40.00 per acre or share or interest in said irrigation system and water appropriations for any legal subdivision entered or filed upon, together with interest on said sum, such lien should be satisfied and discharged.

And said contract of April 30, 1908, further provided that a corporation to be known as the Salmon River Canal Company, Limited (hereinafter sometimes called the "Operating Company") should be organized under the laws of the State of Idaho for the purpose of taking over the management and operation of said irrigation system when the same was in condition for operation or use, and
13 that said corporation should be capitalized on the basis of one share of stock for each acre of land to be irrigated from said irrigation system, viz.: At 150,000 shares, and that there should be issued to the entrymen or purchasers of said lands, as evidence of their respective shares or interests in said irrigation system, one share of stock for each acre entered or filed upon and susceptible of irrigation from said system, and that the water available for distribution in said irrigation system should be divided and distributed in accordance with the number of shares of stock held in said Operating Company by entrymen or owners of land under said system.

V.

That, relying upon the correctness of the determinations made by the State of Idaho and the Secretary of the Interior as to the feasibility of said irrigation system and the sufficiency of the water supply available for said lands under the appropriations made for such purpose and approved as aforesaid, and believing that such determinations were final and binding, and not otherwise, the Construction Company, immediately after having entered into said contract of April 30, 1908, proceeded to carry out in good faith the terms and provisions thereof by it to be kept and performed, and expended, as plaintiff is informed and believes and so alleges the fact to be, upwards of $3,500,000.00 in the construction of said irrigation
14 works and in carrying out the terms of said contract, and built and constructed the irrigation works theretofore approved by the State of Idaho and the Secretary of the Interior as aforesaid for the reclamation of said lands, and the same have been

accepted and approved by the State of Idaho as completed prior to the commencement of this action, and the Construction Company released and relieved from further obligation for the construction of said irrigation system or any part thereof, and said works were substantially completed on or about the 1st day of April, 1911, and water has been available from said irrigation system for the irrigation of the lands hereinafter particularly described since the 12th day of April, 1911, at a point within one-half mile of said lands and premises, and due notice was given the entrymen and owners of said lands by the Construction Company that it was prepared to deliver water for the irrigation of said lands on and after the 12th day of April, 1911.

VI.

That after the Construction Company had entered into said contract and commenced the construction of said works, the State of Idaho requested and demanded that the transfer of shares or interests in said irrigation system by the Construction Company be limited and confined to not to exceed 100,000 acres, and thereafter the State further requested that such shares and interests be limited to 80,000 acres, and that the water supply be distributed over
15 and made appurtenant to not to exceed 80,000 acres.

VII.

That immediately following the execution of said contract of April 30, 1908, and the inauguration of work thereunder by the Construction Company, the State Board of Land Commissioners caused to be published for a period of four weeks in a newspaper published in said Twin Falls County, State of Idaho, and in one newspaper published in Boise, Idaho, a notice that the lands so segregated from the public domain as aforesaid, were open for settlement and the public was further notified by and through such notice or notices of the terms upon which such land could be entered or title thereto acquired and particularly that the Construction Company was authorized and empowered to transfer and issue water rights, shares or interests in said irrigation works to qualified entrymen desiring to enter or file upon such lands, and that such lands could not be entered or filed upon until the entryman had entered into a contract with the Construction Company for the transfer to him for use upon such lands of shares or interests in said irrigation works as contemplated by the said contract between the State and the Construction Company and by the laws of the State of Idaho relating to the entry of such lands.

16 VIII.

That in the exercise of the supervisory powers vested in the State of Idaho over said irrigation project and the entry of lands under the Carey Act, and in order to fully carry out the terms and provisions of the statutes of the State of Idaho relating to the entry of

said lands and the acquisition of shares or interests in such irrigation system, the State Board of Land Commissioners adopted and approved a form of contract to be used by the Construction Company as statutory trustee of the title to said irrigation system and water permit, for the transfer of shares or interests in said irrigation system to entrymen and owners of land thereunder, which contracts were identical as to terms and alike in all respects, except as to the number of shares or interests transferred and dedicated or made appurtenant to land thereunder, and the description of the land to which the same were made appurtenant and the name of the entryman or purchaser, and it was, among other things, provided in said contracts (commonly known as Settlers' Contracts), so approved for use under said project, that the consideration of $40.00 to be paid by the entryman or purchaser for each share or interest, should be paid as follows: $3.00 in cash on the execution of the contract; $2.00 per share on the first day of April, 1911, 1912, 1913, 1914, and 1915; $4.00 per share on the first day of
17 April, 1916, 1917 and 1918, and $5.00 per share on the first day of April, 1919, 1920 and 1921, with interest from April 1, 1910, at six per cent. per annum, payable annually, on the first day of April, with a further provision that if such interest was not paid within thirty days from the date the same became due, then interest should be computed for the entire period at the rate of eight per cent. per annum, and under the terms of such contract the purchaser covenanted and agreed that upon default in the payment of any of the installments of principal or interest the Construction Company might declare the entire amount of the purchase price immediately due and collectible, and might proceed either at law or in equity to collect the same and to enforce any lien which it might have upon the water rights, shares or interests to be transferred under such contracts and upon the land to which such water rights, shares or interests were dedicated, and to enforce any other remedy given the Construction Company by the laws of the State of Idaho against the purchaser, and under the express terms of such contract the purchaser granted, assigned, transferred and set over by way of mortgage or pledge to the Construction Company to secure the payment of the amount due and to become due on such purchase price and the interest payments thereon, the lands to which such water rights, shares and interests were dedicated, and the Con-
18 struction Company was expressly given a first and prior lien on such lands, water rights, shares and interests for the amount payable under such contracts, principal and interest, and as additional security therefor each entryman and purchaser further agreed that the shares of stock issued or to be issued to him in the Salmon River Canal Company, Limited, should be and the same were, by the terms of such contracts, assigned and transferred to and pledged with the Construction Company until all of said payments, principal and interest, had been fully paid, satisfied and discharged. That the Construction Company did use the form of contract so approved in the case of all sales and transfers of shares or interests in said irrigation system, and all of said contracts, after execution by the

Construction Company and the entrymen or purchasers, were submitted to and examined and approved by the State Board of Land Commissioners of the State of Idaho for and on behalf of said State, and after being so approved were thereupon filed for record and were duly recorded in the office of the County Recorder of Twin Falls County, Idaho, being the County in which the lands are situated which were so entered and to which such water rights, shares or interests were dedicated.

That under the said Acts of Congress and the laws of the State of Idaho and the said contract between the Construction Company and the State of Idaho and the said settlers' contracts, the Con-
19 struction Company became entitled to and possessed of the lien authorized to be created by the State of Idaho under the said Acts of Congress against the lands segregated from the public domain as aforesaid, for the actual cost of constructing said irrigation system and the necessary expenses of reclamation and reasonable interest thereon, and such Construction Company became further entitled to and possessed of the lien created by the laws of the State of Idaho in favor of companies constructing irrigation works for the reclamation of lands segregated under said Acts of Congress, and particularly the lien specified or referred to in what is now Section 3019 of the Idaho Compiled Statutes, 1919, and the said settlers' contracts were intended, as plaintiff is informed and believes and so alleges the fact to be, to render more specific the lien so created under the Acts of Congress and the laws of the State of Idaho, and particularly to specify the time or times of payment of principal and interest and the amount of the lien per acre in so far as such amount could be estimated or determined in advance of construction, and the lien created by such contracts was intended to be supplementary to and not in lieu of the lien so created by the Federal and State laws hereinbefore referred to.

X.

That the State of Idaho, having caused to be published
20 the notice required to be published under what is now Section 3008 of the Idaho Compiled Statutes, 1919, the Construction Company accepted applications for entry and entered into settlers' contracts of the form approved as aforesaid with entrymen having the qualifications specified in Section 3009 of the Idaho Complied Statutes, 1919, and with owners of other desert lands situated under said irrigation system covering approximately 73,000 shares or interests for the irrigation of approximately 73,000 acres, all of which contracts were duly approved by the State Board of Land Commissioners of the State of Idaho as aforesaid, but thereafter and in the year 1916, the State Board of Land Commissioners, in the exercise of its supervisory power over such matters, cancelled and annulled contracts so entered into and entries of land made thereunder to an amount aggregating approximately 13,000 acres, and thereby reduced the acreage entitled to water from said irrigation system and the number of outstanding shares or interests therein to

approximately 60,707.8 acres, shares or interests, and declined to approve any further contracts for the transfer of shares or interests in such irrigation system, or to permit the available water therefrom to be distributed over any greater area than 60,070.8 acres, and the defendants herein, joining and combing with other owners or entrymen of land under said irrigation system and owners of shares or interests therein to reduce the acreage for which water shall
21 be supplied or furnished from said irrigation system, have obtained from the United States District Court for the District of Idaho, in a suit wherein one A. E. Caldwell, et al., are plaintiffs, and the said Construction Company and others are defendants, an injunction prohibiting the Construction Company from selling or transferring any further shares or interests in said irrigation system, and adjudging and decreeing that the water supply available therefor shall be distributed over not to exceed 60,070.8 acres, and plaintiff is informed and believes and so alleges the fact to be that the State Board of Land Commissioners of the State of Idaho, on or about the 13th day of March, 1918, made and entered an order that the water available for distribution from said irrigation system should be distributed and made appurtenant to approximately 35,000 net irrigable acres and no more, and that the outstanding shares or interests in said irrigation system, in excess of said number, should be cancelled or reduced accordingly but no other action for such reduction has been taken or had; that by reason of the actions of said State Board of Land Commissioners, as aforesaid, in cancelling and reducing contracts for the transfer and sale of shares or interests in said irrigation system and the injunction so issued and obtained by and at the instance of said defendants and other owners of land under said system, the Construction Company is prevented
22 from supplying water to or obtaining a lien on more than 60,070.8 acres, and if the order of said State Board of Land Commissioners so made and entered on the 13th day of March, 1918, adjudging and determining that such water supply should be limited and confined to approximately 35,000 net irrigable acres be legal and valid, the moneys expended by the Construction Company in the construction of said irrigation system can only be recovered through or by the enforcement of its lien against such acreage; that if the irrigable acreage be limited and restricted to 60,070.8 acres, the actual cost and necessary expense of reclamation and reasonable interest thereon will amount to not less than $60.00 per acre, and in the event said acreage be further reduced, the cost per acre will be increased proportionately.

XI.

That pursuant to the notice published by the State of Idaho as alleged in Paragraph VII hereof, and as required by Section 3008 of the Idaho Compiled Statutes, the lands hereinafter (in this paragraph) particularly described, were thrown open for settlement on or about the 1st day of June, 1908, and on said date, or shortly thereafter, persons, having the qualifications required by Section 3009 of

the Idaho Compiled Statutes and desiring to enter said lands under the said Acts of Congress and the laws of the State of Idaho, made application to the Construction Company, as required by the
23 laws of the State of Idaho and the said State contract, for the purchase of shares or interests in said irrigation system under the form of contract described in Paragraph VIII hereof, and theretofore approved by the State Board of Land Commissioners as aforesaid, and said Construction Company, as was its duty under the laws of the State and said State contract, entered into contracts with the persons desiring to enter or file upon the lands hereinafter described of the form so approved, and such contracts after being duly executed by the Construction Company and such entrymen, were submitted to the State Board of Land Commissioners and were thereupon duly approved by such Board, and the purchasers therein named were allowed to enter and did enter such lands, subject to the liens created as hereinbefore alleged in favor of the Construction Company, and such entries having been allowed, said settlers' contracts were thereupon filed in the office of the County Recorder of Twin Falls County, Idaho, and duly recorded in the proper records of said office, and said entrymen, after having reclaimed and placed under cultivation and made settlement upon the land so entered and otherwise complied with the laws of the State of Idaho, made final proof of reclamation and settlement as provided in Section 3014 of the Idaho Compiled Statutes, in the manner and form required by said Statute and the rules and regulations of such Board,
24 and such proof was thereupon submitted to the State Board of Land Commissioners and duly accepted, allowed and approved by said Board. That said entrymen and their successors, grantees and assigns have failed to pay and discharge the liens created as hereinbefore alleged, in favor of said Construction Company against the said lands, and have failed to pay the installments of principal and interest as the same became due, or at all; that because of such default in the payment of principal and interest, plaintiff has elected to declare the whole amount of both principal and interest remaining unpaid on said liens, as immediately due and payable, and plaintiff claims a first and prior lien against the lands hereinafter described, and the water rights, shares and interests appurtenant thereto, under the said Acts of Congress and the laws of the State of Idaho and the said State and settlers' contracts, for the actual cost and necessary expenses of reclamation and reasonable interest thereon; that the defendants, Max Smith and Jennie Doe Smith, are now the owners of said lands and of said shares and interests and have assumed and agreed to pay and discharge said liens, and the remaining defendants in this cause claim some right, title or interest therein or lien or encumbrance thereon, but plaintiff alleges the fact to be that the title, claims and interests of the said defendants, and each of them, were acquired with full
25 notice of plaintiff's said lien and rights and are subject and subordinate to the lien and claim of plaintiff on and against the said lands and premises and against the water rights, shares

and interests in said irrigation system and shares of stock in said Operating Company, dedicated or made appurtenant to said lands.

That the lands in this *ap*ragraph particularly referred to and against which plaintiff seeks by this action to foreclose its said lien, and the amount of the lien, at the price specified in said settlers' contracts, remaining unpaid against each legal subdivision, are as follows, to-wit:

S. E. ¼ S. E. ¼, of Section 14, Township 11 South, Range 16 East; number of shares dedicated to said lands 40; amount due on principal, $1,400.00, with interest thereon from the first day of April, 1911;

S. W. ¼ S. E. ¼, of Section 14, Township 11 South, Range 16 East; number of shares dedicated to said lands 40; amount due on principal, $1,429.00, with interest thereon from the first day of April, 1911; S. E. ¼ S. W. ¼, S. W. ¼ S. W. ¼, of Section 14, Township 11 South, Range 16 East; number of shares dedicated to said lands 80; amount due on principal, $2,960.00, with interest thereon from the first day of April, 1911;

That according to the terms of said settlers' contracts the aforesaid sums bear interest at the rate of eight per cent. (8%) per annum.

That the amount due as aforesaid against each of said legal subdivisions should, for the reasons set forth in paragraph X
26 hereof, be increased by $20.00 per share for the number of shares dedicated or made appurtenant to said land as aforesaid, with interest thereon at the rate of eight per cent. per annum from the respective dates above set forth, and in the event it should be adjudged or decreed either by this Court or other judicial or administrative tribunals or officials having jurisdiction in the premises, before the final determination of this cause, that the number of shares and interests outstanding in said irrigation system should be restricted to less than 60,070.8 acres, then the amount due on each of the aforesaid shares or interests, and the amount of the lien against each of said legal subdivisions should be increased proportionately, to the end that each acre of land entitled to water from said irrigation system may pay its proportionate part of the actual cost of said works and necessary expenses of reclamation and reasonable interest thereon as provided in the said Acts of Congress and contemplated by the laws of the State of Idaho.

XII.

That long prior to the commencement of this action, the amount due from said defendants as aforesaid, and the lien against the lands described in Paragraph XI hereof, with interest thereon as claimed in said paragraph, were for a valuable consideration duly assigned, transferred and set over to this plaintiff, and plaintiff is now
27 entitled to all sums due and to become due under the liens created as aforesaid against the said lands, and to enforce said liens on and against the lands described in said Paragraph XI, and the said shares and interests in said irrigation systems, and the shares of stock in said Salmon River Canal Company, Limited, so

pledged are now held by plaintiff as additional security for said indebtedness.

In consideration whereof, and for as much as plaintiff is remediless in the premises according to the strict rules of the common law, and can only have relief in a court of equity where matters of this kind are properly cognizable, your plaintiff files this bill of complaint against the said defendants, and prays:

1. That the said defendants and each of them may be required to answer all and singular the matters hereinbefore stated, as fully and particularly as if they were thereunto duly interrogated, but not under oath, answer under oath being hereby expressly waived.

2. That plaintiff be decreed to have a first and prior lien upon the lands and premises described in Paragraph XI of the bill of complaint, and on the appurtenant shares and interests in said irrigation system and the shares of stock in the Salmon River Canal Company, Ltd., representing such shares and interests and pledged as additional security for said indebtedness, and that the amount due plaintiff may be ascertained and determined, and the
28 usual decree made for the foreclosure of plaintiff's lien against said lands, premises and property, and for the payment of the amount due plaintiff as claimed in Paragraph XI of its bill of complaint, and for the sale of said premises and property to satisfy and discharge plaintiff's said claim.

3. That the said defendants and each of them, and all persons claiming under them or either of them, and all other persons who have any liens, claims, judgments or decrees upon the said premises, or any part thereof, either as purchasers, encumbrancers, or otherwise, may be barred and foreclosed of and from all equity of redemption in the said premises.

4. That in the event the proceeds from the sale of said premises and property be insufficient to satisfy and discharge the amount due plaintiff, together with costs of suit and other proper charges, that plaintiff may have judgment for such deficiency against the owners of said premises, defendants herein, and execution therefor.

5. That plaintiff may have such other and further relief in the premises as the nature of the case may require and as may be just and equitable.

And may it please your Honor to grant to this plaintiff a writ or writs of subpœna and other process, directed to the said defendants, and each of them, and issued out of and under the seal of this Honorable Court; thereby commanding them at a certain
29 time and under a certain penalty therein to be named, personally to be and appear before this Court, then and there severally to make full and true answer to this bill of complaint, but not under oath, such answer under oath being hereby expressly waived, and to show cause, if any there be, why the prayer of this bill of complaint should not be granted according to the rule and

practice of this Court, and stand to, conform and abide by such order, direction and decree, as may be made against them in the premises, and as shall seem meet to equity and good conscience.

And your plaintiff, as in duty bound, will ever pray, etc.

COMMONWEALTH TRUST COMPANY
OF PITTSBURGH,
Trustee,
By RICHARDS & HAGA,
Its Solicitors.

Residence, Boise, Idaho.

A. N. EDWARDS,
Of Counsel.

Residing at St. Louis, Missouri.

(Duly verified.)

Endorsed: Filed: Jany. 30, 1920. W. D. McReynolds, Clerk.

30 (Title of Court and Cause.)

Answer of Defendants.

The answer of the above-named defendants to the Bill of Complaint of the above named plaintiff.

These defendants now, and at all times hereafter, saving to themselves all and all manner of benefits and advantages of exception which may be had or taken to the many errors, uncertainties, imperfections and insufficiencies in the Complainant's said Bill of Complaint contained, for answer thereto, or unto so much or such parts thereof as these defendants are advised that it is material or necessary for them to make answer unto, answering say:

I.

Admit that complainant is a corporation organized and existing under the laws of the State of Pennsylvania, and is a citizen thereof, with its principal place of business in the City of Pittsburgh, County of Allegheny, in said State.

II.

Further answering, defendants admit that the defendants, Max Smith and Margaret Smith, are husband and wife, and citizens of the State of Idaho, residing in Twin Falls County, said State; that the true name of the wife of the said Max Smith is Margaret Smith.

III.

Further answering, on information and belief, admit that on or about the — day of August, 1907, the State of Idaho,
31 through its State Board of Land Commissioners, made application to the Secretary of the Interior of the United States under Section 4 of the Act of Congress approved August 18, 1894, commonly known as the "Carey Act," and the acts amendatory thereof, and the laws of the State of Idaho passed in furtherance of the said Acts of Congress, for segregation from the Public Domain and donation or grant to said State of Approximately 127,707.29 acres of desert land situated in Twin Falls County, State of Idaho, which lands and other arid lands in the vicinity thereof make in the aggregate about 150,000 acres, but deny that the State of Idaho represented that the said lands could be irrigated and reclaimed as contemplated by said Acts of Congress from the surplus and unappropriated waters of Salmon River by means of a storage reservoir on said river with an available storage capacity of 180,000 acre feet, and by tunnels, canals, flumes, ditches and laterals to carry and conduct such water from said reservoir and river to, over and upon the said desert lands; but upon information and belief, allege that C. B. Hurtt, George F. Sprague, I. B. Perrine and H. L. Hollister did represent to the State Board of Land Commissioners of the State of Idaho that they were the owners of certain filings for a water right upon the Salmon River in the County of Twin Falls and State of Idaho, and that they had employed engineers and
32 had done a considerable amount of engineering work for the purpose of ascertaining the available amount of unappropriated waters in the Salmon River in the County of Twin Falls, and State of Idaho, and the lands which could be irrigated from said river, which said lands belonged to the Government of the United States, and made request and application to said Land Board to approve of their surveys, and did make application to the said State Board of Land Commissioners of the State of Idaho to be permitted to construct a certain irrigation system for the irrigation of said lands, and requested said Land Board to make application to the Secretary of the Interior of the United States under Section 4 of the Act of Congress approved August 18th, 1894, commonly known as the "Carey Act," and the acts amendatory thereof, to segregate the lands set forth and described in the application of the said C. B. Hurtt, George F. Sprague, I. B. Perrine and H. L. Hollister from the remainder of the lands and public domain owned by the United States for the purpose of having said land reclaimed under the application and proposal of the said Hurtt, Sprague, Perrine and Hollister; that said Land Board requested the State Engineer to investigate the application and proposal of the said Hurtt, Sprague, Perrine and Hollister, and inform the Land Board if, in the opinion of the said State Engineer, the said pro-
33 posal and application, if approved, would be beneficial to the public; that thereupon, and upon the same day and

date of the filing of said application and proposal with the said State Land Board, the said State Engineer, reposing confidence in the said Hurtt, Sprague, Perrine and Hollister, did report that in his opinion the proposal and application of the said Hurtt, Sprague, Perrine and Hollister, if accepted and acted upon, would be to the interest of the public, and that the said plan was feasible; that thereupon the said State Board of Land Commissioners did agree to, and did make, application to the Secretary of the Interior of the United States for the segregation of the lands specified in the said application and proposal of the said Hurtt, Sprague, Perrine and Hollister; that the said proposal embraced the construction, as set forth in Paragraph III of Complainant's Bill of Complaint, of a dam, tunnels, canals, flumes, ditches and laterals to carry and conduct such water from the reservoir mentioned in said proposal located on the said Salmon River over and upon the said desert lands.

And upon information and belief, deny that prior to making said application to the Secretary of the Interior for segregation, the State Engineer for the State of Idaho and said State Board of Land Commissioners had determined, adjudged and decided, as required by the laws of the State of Idaho, relating to such matters, that there was a sufficient surplus and unappropriated waters in said
34 Salmon River available for such purposes to accomplish the reclamation of said lands to the extent and degree required by said Act of Congress; but allege the facts to be that, as hereinabove set forth, the said State Engineer and the said State Board of Land Commissioners, relying upon the presentations of the said Hurtt, Sprague, Perrine and Hollister, and upon an examination of their said proposal, application, surveys, water measurements and data supplied by them, did approve of their said application and proposal, and make application to the Secretary of the Interior for the segregation of said lands. That defendants have no knowledge concerning the action of the Secretary of the Interior in considering and approving said application and in segregating said lands from the public domain, and in determining and deciding concerning the sufficiency of the water supply and the proposed irrigation system, and its suitability for the reclamation of said lands, and demand strict proof of the allegations of complainant that the Secretary of the Interior did make any determination whatsoever concerning the sufficiency of said water supply and said proposed irrigation system to properly reclaim said lands. Admit that the said Secretary of the Interior did, on the 10th day of April, 1908, segregate from the public domain and agree to donate, grant and patent to the State of Idaho the said desert lands described in the ap-
35 plication of the State of Idaho, and aggregating, as aforesaid, approximately 127,707.29 acres; that defendants are without knowledge concerning the determination as to the irrigation and reclamation from said water supply and water appropriations and from the irrigation system described in said application, and demand strict proof concerning said allegations. Admit the same was to be constructed under the supervision of the State of Idaho, as con-

templated by said Acts of Congress and the laws of the State of Idaho, relating to such matters.

IV.

Further answering, defendants admit that on or about the 30th day of April, 1908, the Twin Falls Salmon River Land and Water Company did enter into a contract with the State of Idaho, through its State Board of Land Commissioners to construct said reservoirs, tunnels, canals, ditches and other structures (sometimes known as the Salmon River Project and Salmon River Irrigation System.) Defendants, however, have no knowledge concerning the description in the application to the Secretary of the Interior for the segregation of the said lands; nor have defendants any knowledge concerning the approval by the State of Idaho and the Secretary of the Interior for the reclamation of said lands (sometimes known as the "Carey Act" lands); nor concerning other desert lands in the vicinity thereof; nor have defendants any knowledge as to the said
36 lands aggregating in quantity approximately 150,000 acres. Defendants deny, on information and belief, that said Construction Company entered into said contract relying upon the determination by the State of Idaho and the Secretary of the Interior, that the surplus, flood and other spare waters of the Salmon River available for storage and distribution through said irrigation system were ample and sufficient to reclaim said lands to the extent and degree required by the said Act of Congress and the laws of the State of Idaho, passed in furtherance thereof. And defendants further deny, upon information and belief, that said Construction Company relied upon the correctness and finality of decisions and determinations by the State of Idaho and the Secretary of the Interior, or the State of Idaho or the Secretary of the Interior, as to the amount, quantity of, or sufficiency of, the surplus, flood and unappropriated waters of Salmon River in entering into said contract of April 30, 1908, to accept as its sole compensation for constructing said irrigation system the lien authorized by said Acts of Congress to be created by the State of Idaho on and against said Carey Act Lands and the lien authorized to be created by the laws of the State of Idaho, particularly by what is now Section 3019, Compiled Statutes of 1919, of the State of Idaho, and the consideration that should or ought to be paid under said Acts of Congress and the laws of the State by
37 entrymen and owners of such lands for an interest in said irrigation system or water rights.

Defendants allege upon information and belief that said Construction Company did make its application to the State of Idaho for the segregation of lands under what is sometimes known as the Carey Act Law, and did propose to construct a dam, canals, tunnels, laterals and ditches, and did propose to reclaim and irrigate said lands, they being the same lands referred to in Paragraph IV of Plaintiff's complaint, and did represent to the Land Board of the State of Idaho that said Construction Company had filed upon and had ample water to thoroughly reclaim and irrigate the lands described in the applica-

tion made by said Construction Company for the segregation of said lands.

Defendants, upon information and belief, deny that it was determined by the State of Idaho, and said Irrigation Company, and agreed in said contract that the actual cost of said irrigation works and structures so to be built and constructed by the Construction Company, and other necessary expenses of reclamation and reasonable interest thereon would be the sum of $40.00 per acre when apportioned or distributed equally over the whole 150,000 acres proposed to be reclaimed therefrom. Defendants allege, upon information and belief, that said Construction Company did under-
38 take to reclaim the lands asked to be segregated, or so much of said lands as could be irrigated from the waters filed upon by said Construction Company, which said Construction Company represented to the State Land Board of the State of Idaho to be waters filed upon from the Salmon River, and other waters, and agreed with the State of Idaho to undertake said Construction work and to reclaim lands within said segregation for the price of $40.00 per acre for any of the lands reclaimed by means of the irrigation system proposed to be constructed by said Construction Company, regardless of the number of acres reclaimed, said Construction Company representing to the said State of Idaho its willingness to enter upon said construction work in consideration that it should receive the said sum of $40.00 per acre as full payment for its expenses of reclamation, together with interest at six (6%) per cent per annum from the time of actual reclamation of each tract or subdivision within said segregation, until actually disposed of to settlers upon any subdivision.

Defendants admit that it was provided in said contract that upon payment of the sum of $40.00 per acre, or share of stock, together with interest on said sum, such lien should be satisfied and discharged.

Defendants admit that under the contract of April 30, 1908, it was provided that a corporation to be known as the Salmon River Canal Company, Limited, (hereinafter sometimes called the
39 Operating Company), should be organized under the laws of the State of Idaho for the purpose of taking over the management and operation of said irrigation system when the same was in condition for operation or use, and that said corporation should be capitalized on the basis of one share of stock for each acre of land to be irrigated from said irrigation system, viz.: at 150,000 shares, and that there should be issued by the entrymen or purchasers of said lands, as evidence of their respective shares or interest in said irrigation system, one share of stock for each acre entered or filed upon, and susceptible of irrigation from said system, but on information and belief deny that one share of stock for each acre entered, or filed upon, and susceptible of irrigation from said system, and that the water available for distribution in said irrigation system should be divided and distributed in accordance with the number of shares of stock held in said operating company by entrymen, or owners of land, under said system; but allege, upon information and belief the

facts to be that said shares of stock were to evidence the right of the purchaser of each share to 2¾ acre feet of water for each and every acre filed upon by entrymen, and that shares of stock should not be sold beyond the available supply of water necessary to furnish 2¾ acre feet of water to each and every acre filed upon, and that each share of stock should represent and entitle the owner thereof to 2¾ acre feet of water per acre.

V.

Further answering, defendants, upon information and belief, deny that, relying upon the correctness of the determinations, or any determinations, made by the State of Idaho and the Secretary of the Interior, or the State of Idaho, or the Secretary of the Interior, as to the feasibility of said irrigation system, and the sufficiency of the water supply available for said lands, under the appropriations made for such purpose, and approved as alleged in complainant's complaint, that said Construction Company, believing that such determinations were final and binding, and not otherwise, immediately after entering into said contract of April 30th, 1908, proceeded to carry out in good faith the terms and provisions theerof by it to be kept and performed. Defendants alleging, on information and belief, that the said Construction Company did, relying entirely upon its own determinations, and the work of its own engineers, and that of its assignors, as to the sufficiency of said water supply, available for said lands, under appropriations, made by the assignors of said Construction Company, did proceed to do work under its said contract.

Defendants deny, upon information and belief, that said Construction Company expended upwards of $3,500,000 in the construction of said irrigation works and in carrying out the terms of said contract; but on the contrary, allege that the Construction work done upon said project, or segregation, was done by the American Water Works and Guaranty Company and by W. S. Kuhn and James S. Kuhn, of Pittsburgh, Pennsylvania, and their associates, and that said Construction Company did not pay out or expend, or incur liabilities, exceeding the sum of $1,000,000.00 in and upon said construction work.

And further deny, upon information and belief, that said Construction Company did build and construct the irrigation works theretofore approved by the Secretary of the Interior, and the State of Idaho, for the reclamation of said lands, and deny that the same have been accepted and approved by the State of Idaho as completed prior to the commencement of this action, and the Construction Company released and relieved from further obligations for the construction of said irrigation system, or any part thereof; and deny that said works were substantially completed on or about the first day of April, 1911, at a point within one-half mile of said lands and premises involved in this action. Defendants admit due notice was given the entrymen and owners of said lands by the Construction Company; that it was prepared to deliver water for the irrigation of said

lands on and after the 12th day of April, 1911, and upon information and belief, allege the fact to be that said Construction
42 Company had only constructed a dam and certain tunnels, canals, laterals and ditches for the carrying of water at that time, and since said time, and that the construction of said dam, tunnels, canals, ditches and laterals has recently been accepted by the State of Idaho as having been completed, conditioned, however, upon the reservation and refusal of the State of Idaho to accept said work as having furnished an ample supply of water for the irrigation of the lands in said segregation, or any legal subdivision of said lands, within the bounds of said segregation, including the lands involved in this action.

VI.

Further answering, defendants allege that they are without knowledge concerning the facts set forth in Paragraph VI of the Plaintiff's Bill of Complaint, and based upon said lack of knowledge deny the same, and demand strict proof of said allegations.

VII.

Further answering, defendants admit the allegation of Paragraph VII of plaintiff's Bill of Complaint.

VIII.

Further answering, defendants admit that the State Board of Land Commissioners adopted and approved a form of contract to be used by the Construction Company for the transfer of shares or
43 interests in said irrigation system to entrymen of lands thereunder, but deny that said contracts were approved to "be used by the Construction Company as statutory trustee of the title to said irrigation system and water permit," and as to whether the said approved form of contracts were identical as to term, and alike in all respects except as to the number of shares or interest transferred, and dedicated, or made appurtenant to lands thereunder, and the description of lands to which the same were made appurtenant, defendants have no knowledge, and demand strict proof of said allegations. Defendants admit that it was provided in said contracts (commonly known as Settlers' Contracts) approved and to be used on said project, that the consideration was to be $40.00 to be paid by the entrymen or purchaser for each share of stock; admit that said payment was for each share or interest, and allege the fact to be that it was for each share; admit that payment was to be made in installments as alleged by complaint; admit that said contract provided that if interest was not paid within 30 days from the date the same became due, then interest should be computed for the entire period at the rate of 8% per annum, and under the terms of the said contract the purchaser covenanted and agreed that upon default in the payment of any of the installments of principl

or interest, the Construction Company might declare the en-
44 tire amount of the purchase price immediately due and collectible, and might proceed, either at law or in equity, to collect the same and to enforce any lien which it might have upon the water rights, but deny that said contract provided for any enforcement of any rights upon any share or interest to be transferred under the said contracts; admit that said contract provided that upon default said Construction Company should have the right to enforce any lien which it might have upon the lands to which said water rights were dedicated, or at its option to proceed to enforce any remedy given by the laws of the State of Idaho to the said Construction Company against the purchaser, but deny that said contract gave the right to said Construction Company to proceed at law or in equity, to collect because of such default, and to enforce any other remedy given the said Construction Company by the laws of the State of Idaho against the purchaser; admit that under the terms of said contract the purchaser granted, assigned, transferred and set over by way of mortgage or pledge, to the said Construction Company to secure the payment of the amount due and to become due on such purchase price and the interest payments thereon, all rights which the said purchaser had or which might thereafter accrue to him under his contract with the State of Idaho for the purchase of lands to which the water rights were dedicated, deny that under said contract the Construction Company was ex-
pressly given a first and prior lien upon such lands, water
45 rights, shares, and interests, for the amount payable under the said contracts, principal and interest, and again deny that under the said contracts there was any provision concerning any "interests" involved in said contracts, save only as related to the entire irrigation system, as an incidental right, and allege that said shares represented two and three-fourths acre feet of water, per share, for each acre of land, together with an undivided interest with all other purchasers of water rights in the entire irrigation system. Admit that each entryman and purchaser further agreed that the shares of stock issued, or to be issued, to him in the Salmon River Canal Company, Limited, should be, and the same were, by the terms of such contracts, assigned and transferred to and pledged with the Construction Company until all of said payments, principal and interest, had been fully paid, satisfied and discharged, and allege that under such transfer and pledge the said Construction Company has had absolute control and management in the election of officers, and the management of the entire irrigation system, as operated by the Salmon River Canal Company, Limited, although said pledge and transfer and said action of said Construction Company in voting said stock, and managing said Salmon River Canal Company, Limited,
was illegal and said agreement void. That defendants have
46 no knowledge concerning the question as to whether said Construction Company did use the same form of contract alleged to have been approved in the consum-ation of all sales, and transfers, shares or undivided interests in said irrigation system, and that all of said contracts, as executed by the Construction Company,

and the entrymen, or purchasers, were submitted to and examined and approved by the State Board of Land Commissioners of the State of Idaho for and on behalf of said State, and that after being so approved were thereupon filed for record, and duly recorded in the office of the County Recorder of Twin Falls County, Idaho, and based upon said lack of knowledge demand strict proof of said allegations.

IX.

Further answering, defendants deny that under an Act of Congress, and the laws of the State of Idaho, and the said contract, entered into by the Construction Company, and the State of Idaho, and the said Settlers' Contracts, the Construction Company became entitled to and possessed of the lien authorized to be created by the State of Idaho under the said Acts of Congress against the land segregated from the public domain, as aforesaid, for the actual cost of constructing said irrigation system, and the necessary expenses of reclamation and reasonable interest thereon. And deny that such Construction Company has become further entitled to and possessed of the lien created by the laws of the State of Idaho in favor
47 of companies constructing irrigation works for the reclamation of lands segregated under said Acts of Congress, and particularly the lien specified, or referred to, in what is now Section 3019, of the Idaho Compiled Statutes, 1919, and deny that said Settler's Contracts were intended to render more specific the lien so created under the Acts of Congress and the laws of the State of Idaho. Admit that said Settlers' Contracts were intended to particularly specify the time or times of payment of principal and interest, and amount of the lien per acre, but allege that said specifications as to payment were based upon an implied contract on the part of said Construction Company that it had, or would reclaim the lands involved in said contract, reclaiming the same with an ample supply of water as required by the Federal Statutes in such case made and provided as a condition precedent to said payments. Deny that said contract was intended to specify an amount, as an amount estimated in advance of construction. Admit that the lien under said contract was not in lieu of the lien created by the Federal and State laws in plaintiff's Bill of Complaint referred to. Deny that said contract was intended to create a supplementary lien to the lien specified by the Federal and State laws in such cases made and provided. Deny that Defendants had, or have, any such title or interest in and to the lands within said segregation, as entitled defendants to grant or create any lien upon any of such
48 lands, other than the specific lien authorized by the Federal Statutes, and allege that the lien authorized by the Federal and State laws does not enure to the benefit of said Construction Company unless, and until, said Construction Company reclaim specific subdivisions of lands within said segregation, and allege that the grantors and predecessors of said Construction Company, and said Construction Company in applying to the State of Idaho

to have the United States Government make said segregation, did propose the price of $40.00 per acre as the unconditional price to be charged by said Construction Company for reclaiming any or all legal subdivisions within said segregation.

X.

Further answering plaintiff's Bill of Complaint, defendants admit that the State of Idaho did cause to be published notices as requested by said Construction Company, under what is now Section 3008, Idaho Compiled Statutes, 1919. Admit that the Construction Company accepted applications for entry, and entered into Settlers' Contracts of the form approved by said State with entrymen having the qualifications specified in Section 3009 of the Idaho Compiled Statutes, 1919, also with owners of other desert lands now situated under said irrigation system, but as to the number of acres for which applications for Settlers' Contracts were made, defendants have no knowledge, and upon that ground deny said allegation, and
49 demand strict proof that there were 73,000 shares sold, including those not embraced within said segregation, and deny that there were any "interests" sold, but that whatever applications were made for entry were for "shares" entitling the owners to two and three-fourths (2¾) acre feet of water per acre of land, together with an undivided interest in the entire irrigation system. And having no knowledge, upon that ground, deny that there were shares sold for the irrigations of approximately 73,000 acres, or that the same was duly approved by the said State Board of Land Commissioners of the State of Idaho, and demand strict proof of said allegations. Admit that in the year 1916 the said Board of Land Commissioners cancelled and annulled contracts and entries of land made thereunder to an amount aggregating approximately 13,000 acres, but as to the amount to which said acreage was reduced, and as to the number of outstanding shares there were, and as to whether the same amounted to 60,070.8 acres, shares or interests, defendants have no knowledge, and again deny that any reduction made was a reduction of any "interests," but as a reduction of "shares" of stock as provided for in the organization of the corporation to operate said system. Admit that said Land Board declined to approve any further contracts for the transfer of shares or of any interest whatsoever in such irrigation system, or to permit the available
50 water therefrom to be distributed over any greater area than under the restriction made by said order, but as to said acreage defendants again deny knowledge. Defendants deny that he (or they) joined and combined with others, or entrymen of lands under said irrigation system, or owners of shares or owners of undivided interests in said system to reduce the acreage for which water shall be supplied or furnished from said irrigation system, or that these defendants obtained from the United States District Court of the District of Idaho in a suit wherein one E. A. Caldwell, et al., are plaintiffs, and the said Construction Company and others are defendants, enjoining and preventing the Construction Company

from selling or transferring any further shares or interests in said irrigation system, and adjudging and decreeing that the water supply available therefor, shall be distributed over not to exceed 60,070.8 acres, although defendants do allege the fact to be that the water supply from said Salmon River is insufficient to furnish two and three-fourths acre feet of water to exceeding 25,000 acres, and further allege that said water supply from said Salmon River is insufficient to furnish an ample supply of water, or to redeem exceeding 35,000 net acres of land.

Defendants admit that the State Board of Land Commissioners of the State of Idaho, on or about the 13th day of March, 1918, made and entered an order that the water available for distribution
51 from said irrigation system should be distributed and made appurtenant 35,000 net irrigable acres and no more, and that the outstanding shares or interests in said irrigation system in excess of said number should be cancelled or reduced accordingly; deny that no other action for such reduction has been taken or had, and allege the fact to be that said Land Board has followed up said order with a request made by said State Land Board upon the land office of the United States Government for patents for 35,000 acres of land in a compact body to be irrigated and redeemed from said irrigation system, and that no affirmative action has been taken upon said request by the Land Office of the United States Government, by reason of the fact that said Construction Company has wholly failed and neglected to redeem any of the lands under said segregation by furnishing an ample supply of water as provided for in the Federal Statutes in such case made and provided, and that for that reason the said Land Office and the Secretary of the Interior have refused to grant any patents within said segregation. Admit that by reason of the action of the said State Board of Land Commissioners in cancelling and reducing contracts for the transfer and sale of shares in said irrigation system, and by reason of an injunction obtained by others than these defendants, issued and obtained from the United States District Court for the District of Idaho, that said Construction Company is prevented from supplying
52 water to, or obtaining a lien on, more than 60,070.8 acres, and in fact, on more than such acreage to which said tract may be reduced. Defendants deny that by reason of the order of the said State Board of Land Commissioners, entered on the 13th day of March, 1918, adjudging and determining that such water supply should be limited and confined to approximately 35,000 net irrigable acres (or to any other similar acreage), that the moneys expended by the said Construction Company in the construction of said irrigation sy-tem can, or could, only be recovered through or by the enforcement of its lien against such reduced acreage; and allege the fact to be that the said Construction Company did, on the 1st day of June, 1908, execute a certain Deed of Trust, to secure the payment of certain bonds, and in said Deed of Trust did designate as trustee the American Trust and Savings Bank of the City of Chicago; that by subsequent action and steps taken the plaintiff was substituted as Trustee in said Deed of Trust. That said Deed

of Trust was executed and made a lien upon the dam and irrigation works constructed by the Twin Falls Salmon River Land & Water Company, and upon the water rights acquired by said company, that by the terms of the said Deed of Trust there was secured bonds to the amount of $2,000,000.00; that it was further provided in said Deed of Trust that the water contracts upon which this action
53 is founded should be assigned to said trustee as collateral security for the payment of said bonds. Defendants further allege that in addition to the said Deed of Trust, lien and the assignment of the contracts sued on in this action, that the payment of the said bonds executed by the said Twin Falls Salmon River Land & Water Company, secured in said Deed of Trust, was guaranteed by the American Water Works & Guaranty Company, a corporation, duly organized and having its principal office in the City of Pittsburgh, in the State of Pennsylvania; that said American Water Works & Guaranty Company was the parent company, and the Twin Falls Salmon River Land & Water Company a mere subsidiary of the said American Water Works & Guaranty Company. That the plaintiff's beneficiaries under said Deed of Trust, and the beneficiaries under the assignment of the contracts, upon which this action is based, each for a valuable consideration, released the guarantee held by them from the said American Water Works & Guaranty Company without the consent of these defendants. Defendants deny, upon information and belief, that if the irrigable acreage be limited and restricted to 60,070.8 acres, the actual cost and necessary expense of reclamation, with reasonable interest thereon, will amount to not less than $60.00 per acre, and deny that in the event said acreage is further reduced, the cost per acre will be increased proportionately.

54 XI.

Defendants admit that pursuant to notices published by the State of Idaho, (but not as alleged in Paragraph VII. of Plaintiff's Bill of Complaint, but as provided for in Section 3008, Idaho Compiled Statutes,) the lands particularly described in Paragraph XII. of Plaintiff's complaint were thrown open for settlement on or about the 1st day of June, 1908, and that persons having qualifications required by Section 3009, Idaho Compiled Statutes, did enter said lands under said acts of Congress, and the laws of the State of Idaho, and did make application to the said Construction Company, as required by the laws of the State of Idaho, and the said State Contract for the purchase of shares, but not of "interests" (except an undivided interest) in said irrigation system under the form of contract described in Paragraph VIII. of Plaintiff's Complaint, and theretofore approved by the State Board of Land Commissioners and said Construction Company, and that said Construction Company entered into contracts with persons desiring to enter or file upon the lands described, and that such contracts, after being executed by the said Construction Company to the entrymen, were submitted to the said Board of Land Commissioners and approved by said Board;

also that the purchasers therein named were allowed to enter, and did enter such lands subject to the liens provided for in the
55 United States Statutes and the laws of the State of Idaho, but deny that said purchasers entered said lands according to liens, as alleged in said Bill of Complaint, in favor of such Construction Company. Admit that said entries having been allowed, said settlers' contracts were filed in the office of the County Recorder of Twin Falls County, Idaho, and duly recorded in the proper records of said office; admit that said lands were reclaimed and placed under cultivation and settlement made upon the lands so entered, according to the requirements of the laws of the State of Idaho, and that final proof was made on reclamation and settlement, as provided in Section 3014, Idaho Compiled Statutes, and the rules and regulations of such board, and admit that such proof was submitted to the State Board of Land Commissioners and duly accepted, allowed and approved by said board. Deny that said entrymen, their successors, grantees and assigns have failed to pay and discharge any liens created, as in said Paragraph XI. of Plaintiff's Bill of Complaint alleged, in favor of said Construction Company against the said lands. Deny that said entrymen, their successors, grantees and assigns have failed to pay and discharge any installments of principal and interest as the same became due, or at all; and in this connection defendants allege the fact to be that the said Construction Company has failed to comply with the laws of the United States in furnishing an ample supply of water in a
56 substantial ditch or canal, to reclaim that particular tract, or those particular tracts of land as required by said statutes, and involved in this action, and described in Plaintiff's Bill of Complaint, and as required by the contract between the United States Government and the State of Idaho, and by the contract between the State of Idaho and the said Construction Company, concerning the lands and all portions of lands in Plaintiff's Bill of Complaint described. Defendants deny that the plaintiff is entitled to a first and prior lien, or any lien at all, against the lands in said Bill of Complaint described, or against the water rights, shares and interests appurtenant thereto, under the said Acts of Congress, and the laws of the State of Idaho, or the Acts of Congress or laws of the State of Idaho, and the said State and Settlers' Contract, or any lien at all, for the actual costs and necessary expenses of reclamation and reasonable interest thereon. Deny that plaintiff is entitled to any such liens against the lands in said Bill of Complaint described, or against the water rights, shares and interests appurtenant thereto, under the Acts of Congress, and the laws of the State of Idaho, and said State and Settlers' Contract, for any sum of money, or at all, until said Construction Company shall have actually furnished an ample supply of water in a substantial ditch or canal, or by artesian wells or reservoirs to reclaim the lands, or particular subdivisions of lands in said Bill of Complaint described, and then only
57 a lien for the security of the payment of $40.00 per share per acre of land.

Deny that the defendants, Max Smith and Margaret Smith, are

now the owners of said lands, or that they can become the owners of said lands until said Construction Company, or someone on its behalf, redeems said lands by furnishing an ample supply of water for the redemption of said lands, according to the Federal Statutes in such case made and provided; but allege the fact to be that these defendants have an equitable interest in said lands, and all of said shares of water stock (but not "interests"), described in Plaintiff's Bill of Complaint. Deny that they have agreed to pay and discharge said liens, and deny that the said plaintiff in this cause has any claim, right, title or interest therein, or any lien and incumbrance upon defendants' equity in said lands. Deny that the defendants acquired their said interests with full notice, or any other notice, or at all, of plaintiff's claim of said liens and rights now asserted by plaintiff, and deny that the titles, rights and interests of these defendants are subject to, or subordinate to, any lien or claim of plaintiff on or against said land and premises or water rights, shares and interests in said irrigation system, and shares of stock in said operating company, dedicated or made appurtenant to said lands.

58 Admit that the lands in which defendants have said equitable interest and against which plaintiff seeks, by this action, to set up and enforce the alleged liens of plaintiffs, are properly described in Paragraph XI. of Plaintiff's Bill of Complaint. Deny that the amount of said alleged liens, or any remaining unpaid purchase price against each, or any of said legal subdivisions, are due and unpaid; but allege the fact to be that defendants are ready and willing to pay, and hereby tender payment of the sum of $40.00 per share, for each and every share of stock described in the contract upon which this action is founded, payable in installments, as in said contract provided, as soon as said Construction Company, or someone on its behalf, furnishes an ample supply of water to said lands, and thereby reclaims the same, according to the provisions of the Federal Statutes, commonly called the "Carey Act," so that patents may issue for said lands to defendants; said ample water supply to be as defined in, and as set forth in, said contract as two and three-quarter acre feet of water at place of delivery. Deny that according to the terms of said Settlers' Contracts that the aforesaid sums claimed by plaintiff as due in its Bill of Complaint, have heretofore borne, or now bear interest at the rate of 8% per annum, or any other rate of interest or sum whatsoever, until such time as said Construction Company, or said plaintiff, or someone on behalf of said Construction Company, reclaim said lands by furnish-
59 ing an ample supply of water, as required by the Federal Statutes in such case made and provided.

Deny that the amount due, as against each and every legal subdivision, should, for the reasons set forth in Paragraph X. of the Bill of Complaint, or for any reason at all, be increased $20.00 per share for the number of shares dedicated, or made appurtenant to said lands, as aforesaid, or that the same should be increased in any sum whatsoever, or at all, with interest thereon at the rate of 8% per annum from any date whatsoever, or at all. Deny that, if

in any event, it should be adjudged or decreed, either by this Court, or other judicial or administrative tribunal, or officers, having jurisdiction in the premises, before the final determination of this cause, that the number of shares, or interests, outstanding in said irrigation system, should be restricted to less than 60,070.8 acres, and that the amount due on each aforesaid share or interest, and the amount of the lien against each of said legal subdivisions, or any lien whatsoever, if any there be, should be increased proportionately to the end that each acre of land entitled to water from said irrigation system may pay its, or any proportionate part of the actual cost of said works, and the necessary expenses of reclamation, and interest thereon, as provided in the said Acts of Congress, or contemplated by the laws of the State of Idaho, other than the sum of $40.00
60 per acre, as provided by contract, from the time of actual reclamation by the Salmon River Canal Company, Limited, on any legal subdivision of said lands, subject, however, to claim of breach of contract and fraud and damages therefor, as alleged and hereafter more fully set forth.

XII.

Further answering, these defendants deny any knowledge concerning any alleged assignment of the liens claimed by plaintiff against the lands described in Paragraph XI., or that plaintiff is entitled to all, or any sums due or to become due, under liens claimed by the plaintiff in its Bill of Complaint, as claimed against said lands, or the right of the plaintiff to enforce any of said liens (if any there should be), against the lands described in Paragraph XI., or against said shares and interests in said irrigation system, and therefore deny each and every one of the allegations of Paragraph XII. of plaintiff's Bill of Complaint, and demand strict proof of each and all of said allegations.

Defendants, further answering, and as an affirmative defense to the Bill of Complaint filed against them, do answer and allege:

I.

That George F. Sprague, C. B. Hurtt, H. L. Hollister and I. B. Perrine did file a certain paper in writing, dated August 12, 1907, with the Board of Land Commissioners of the State of Idaho
61 (representing to the said board that they had been for some time engaged in surveying and making plans for the construction of extensive irrigation works in the County of Twin Falls, in the State of Idaho, for the purpose of irrigating a large tract of arid land lying in the southerly portion of the south side of the Twin Falls County, as a Carey Act Entry, and further representing that they desired, with the approval of said board, to construct irrigation works to cover and irrigate, and render fit for farming and the growing of crops, a certain tract of arid land in said southern portion of the State of Idaho, and requested said Board of Land Commissioners to select and procure a segregation under the so-

called Carey Act of Congress of the United States, of certain lands designated in a list of lands filed with said application and proposal, in order that said lands might be reclaimed by the irrigation system so desired by said Sprague, Hurtt, Hollister and Perrine, to be constructed, and further represented that they would cause to be organized a corporation, with capital sufficient to complete said works and put the same in operation upon said entire tract within five years from the time of segregation, and the said corporation formed would construct such irrigation works, a copy of which said proposal is hereto attached, marked Defendants' Exhibit "A," and is asked to be taken and read as a part of this answer. That, as will
62 appear from said application and proposal, said Sprague, Hurtt, Hollister and Perrine set forth in said application that they had obtained a permit from the State Engineer of the State of Idaho for the permitting of an appropriation of certain public waters of the State of Idaho for the purpose of irrigating the lands asked to be segregated.

That on the same day of the filing of said application and request, there was filed with the said State Board of the State of Idaho, by the said Sprague, Hurtt, Hollister and Perrine, a certain letter signed by one A. J. Wiley, a consulting engineer, representing that said engineer had ascertained the amount of water available for the reclamation of said lands, a copy of which said letter is hereto attached, marked Defendants' Exhibit "B," and is asked to be taken and read as a part of this answer. That upon the said date, to-wit: August 12th, 1907, the State Engineer of the State of Idaho, as defendants are informed, believe, and therefore allege, relying upon and placing confidence in the representations of the said Sprague, Hurtt, Hollister and Perrine and the said A. J. Wiley, consulting engineer, did, without making the examination required by law, give his approval to the application and proposal of the said Sprague, Hurtt, Hollister and Perrine, a copy of which said approval is hereto attached, marked Defendants' Exhibit "C," and is asked to be taken and read as a part of defendants' answer.

63 That pursuant to the approval of said State Engineer, defendants are informed, believe and therefore allege, the said State Board of Land Commissioners of the State of Idaho, still relying upon and placing confidence in the representations of the said Sprague, Hurtt, Hollister and Perrine, did make a request of the Land Office of the United States Government for the segregation of the lands under the so-called "Carey Act" law, in accordance with the application and proposal of the said Sprague, Hurtt, Hollister and Perrine.

That pursuant to the said application, the United States Land Office did consent to segregate the lands in accordance with the request and proposal of the said Sprague, Hurtt, Hollister and Perrine, and in accordance with the United States Statutes in such case made and provided, commonly known as the "Carey Act Law," and the amendments thereto.

II.

Defendants further allege, that in order to make said segregation complete, in accordance with the United States Statutes in such case made and provided, and in pursuance of the authority vested in the Secretary of the Interior of the United States, as well as in the President of the United States, and by virtue of the authority conferred upon the Governor of the State of Idaho by the laws of the State of Idaho, the Secretary of the Interior, with the approval of the
64 President of the United States, did enter into articles of agreement with the Governor of the State of Idaho on behalf of the State of Idaho, on the 10th day of August, 1908, segregating lands from the public domain, for the purpose of having the same reclaimed by irrigation, the said Idaho lands being desert in character and worthless otherwise than by means of irrigation, which said agreement was entered into pursuant to the request of said Sprague, Hurtt, Hollister and Perrine, a copy of which agreement is hereto attached, marked Defendants' Exhibit "D," and is asked to be taken and read as a part of defendants' answer.

III.

Defendants further allege that pursuant to and by virtue of the contract entered into between the United States Government and the State of Idaho, and to comply with the application and proposal of the said C. B. Hurtt, George F. Sprague, I. B. Perrine and H. L. Hollister, the State of Idaho did also enter into an agreement on the 30th day of April, 1908, with the Twin Falls Salmon River Land & Water Company (it being the company that said Hurtt, Sprague, Perrine and Hollister had proposed to said Land Board that they would organize for the purpose of reclaiming the lands or legal subdivisions of the lands referred to, and to which said Company, as is set forth in said agreement, the said Hurtt, Sprague, Perrine and Hollister had assigned all of their rights under said proposal
65 and request), for the construction of said dam, reservoir and irrigation system, a copy of which said agreement is hereto attached, marked defendants' Exhibit "E," and is asked to be taken and read as a part of this answer.

IV.

Defendants further allege, that, pursuant to the terms of said agreement between the State of Idaho and the Twin Falls Salmon River Land & Water Company, hereinafter for brevity called "the Company," "the Company" did proceed to construct a reservoir, dam, tunnels, canals and ditches for the purpose of reclaiming the lands described in the -fendants' Exhibits "A," "B" and "C." That said Company did, on the first day of June, 1908, execute a certain Deed of Trust to the American Trust & Savings Bank of the City of Chicago, to secure the payment of Two Million ($2,000,000) Dollars in bonds, said Deed of Trust being recorded in the County Re-

corder's Office of Twin Falls County, Idaho, in Book Five of Mortgages, at page 302, on the 22nd day of August, 1908, a duplicate copy of which said mortgage is filed also with chattel mortgages in said Recorder's Office, a copy of which said Deed of Trust is hereto attached, marked Defendants' Exhibit "F," and is asked to be taken and read as a part of this answer. That, according to the terms of said—Deed of Trust was made "a lien on all dams, reservoirs, canals,
ditches, laterals, headgates, flumes, and entire irrigation sys-
66 tem of the Company, together with all the lands, rights-of-
way, easements, privileges and franchises for said dam, reservoirs, canals, ditches, laterals and irrigation system, and all the appliances, power, privileges and appurtenances connected therewith, now owned by the Company, or which it may hereafter acquire.

"Also all the water rights, for the irrigation of lands in Twin Falls County, State of Idaho, under that certain water permit issued by the State Engineer of the State of Idaho, No. 2659, for the appropriation of waters in the Salmon River in Twin Falls County, State of Idaho, and under that certain permit No. 2981, issued by the State Engineer of the State, authorizing the appropriation of the waters of Deep Creek in Twin Falls County, State of Idaho, and under that certain permit No. 3267, issued by the State Engineer of the State of Idaho, for the appropriation of the waters of Salmon River in Twin Falls County, State of Idaho."

"Also all the rights, grants, interests, privileges, easements, and franchises acquired by the Company under that certain contract dated April 30th, 1908, made and entered into between the State of Idaho, through the State Board of Land Commissioners of said State, and the Twin Falls Salmon River Land & Water Company."

Said Deed of Trust also provides that

"The property rights and franchises hereinbefore described, granted unto the Trustee under the terms of this mortgage, are granted and conveyed unto said Trustee subject to the provisions
as to the transfer of possession and management thereof, as set
67 forth in Section 9 of the contract between the State of Idaho and the Company, dated April 30th, 1908.

"And all such notes, contracts and mortgages now owned, or which may hereafter be acquired by the Company, in consideration of the sale, or agreement for sale, of water rights to the owners and claimants of lands, subject to irrigation under its present or future irrigation works, as shall be assigned in writing by the Company, and be deposited hereunder, in accordance with the provisions hereof. It being the intent to subject to lien, either legal or equitable hereof, only such notes, contracts and mortgages, as shall be hereafter specifically and in writing assigned to and deposited with the Trustee aforesaid."

"This mortgage is made subject to all of the provisions in the contract between the State of Idaho, through the State Board of Land Commissioners and the Company, dated April 30th, 1908, and the provisions of the act of Congress, known as the 'Carey Act,'

and acts amendatory thereof, and the laws of the State of Idaho, accepting the terms of the Carey Act, and is also subject to the provisions of the contract between the United States of America and the State of Idaho, segregating the Carey Act lands referred to herein."

That One Hundred and Forty bonds (140) of the denomination of One Thousand ($1,000) Dollars each, secured by said Deed of Trust, matured June 1st, 1911; that One Hundred and Forty-nine (149) bonds of the denomination of One Thousand ($1,000) Dollars
68 each, matured June 1st, 1912; that One Hundred and Forty-nine bonds of the denomination of One Thousand Dollars each matured June 1st, 1913; that One Hundred and Forty-nine bonds of the denomination of One Thousand Dollars each matured June 1st, 1914; that, as to each and every of said bonds these defendants allege that the same are barred by the Statute of Limitations of the State of Idaho, and as to said bonds, plead the bar of said statute.

Defendants also allege that of the water contracts herein sued on, each and every of said water contracts, as set forth in plaintiff's Bill of Complaint, provided that the deferred payments should become due, as follows:

First deferred payment, due April 1st, 1911, total amount..	$168.80
Second deferred payment, due April 1st, 1912, total amount	164.00
Third deferred payment, due April 1st, 1913, total amount	159.20
Fourth deferred payment, due April 1st, 1914, total amount	154.40

That each and every of said installment- of payments are barred by the Statute of Limitations on each and every contract sued upon in this action, and on each and every of said installment- of payments due respectively, April 1st, 1911; April 1st, 1912; April 1st, 1913, and April 1st, 1914. That the Company further covenanted
69 in said Deed of Trust that it "will duly perform and punctually cause to be kept and performed each and every term and agreement by it to be kept and performed in the contracts with the State of Idaho and with the United States, for the construction of its canal and irrigation system, and that it will duly and punctually perform each and every of its contracts with any settler, or other person, for the furnishing or supply of water from its said irrigation and reservoir system."

That as will further appear from a reading of said Deed of Trust, it was provided, that if the Company should make "default in the performance of any of the covenants herein contained, the said party of the first part, (that is, the Company), its successors and assigns, shall and will severally, waive the issuance and service of process, enter into their voluntary appearance in such suit or proceeding, consent to the entry of an order for possession of said canals, dam, reservoirs, water rights, irrigation system, easements and property hereby mortgaged, and every part thereof, or so much thereof as is sought to be reached by said suit, or proceedings; and at and upon the commencement by the Trustee of any suit, or proceeding, upon default of the performance of any of the covenants herein contained, for the foreclosure of this mortgage, the party of the first part, its

successors and assigns, shall and will severally, waiving the issuance and service of process, enter their voluntary appearance in
70 such suit, or proceeding, and consent to the appointment of a receiver of said canals, dam, laterals, reservoirs, water rights, irrigation system, easements and property hereby mortgaged, and the income and revenue therefrom, and of the notes, contracts and mortgages hereafter assigned to and deposited with the Trustee, under the provisions hereof, for the sole benefit of the holders of the said bonds secured hereby."

Defendants allege that by reason of the covenants and conditions in said Deed of Trust set forth, the plaintiff and the beneficiaries under said Deed of Trust acquired the bonds held by them, and the contracts herein sued upon with full notice of the rights, duties and obligations of the Company to carry out the terms and conditions of the contract between the United States Government and the State of Idaho, under and pursuant to the provisions of the United States Statutes, hereinabove referred to as the "Carey Act," and the amendments thereto, and with full notice of the duties of the Company to furnish an ample supply of water in a substantial ditch or canal, or by artesian wells or reservoirs, to reclaim a particular tract, or tracts, of lands described in plaintiff's Bill of Complaint, in order that patents should issue therefor from the United States to the State of Idaho, and from the State of Idaho to these defendants, and of the duties of said Company under its contract with the State of
71 Idaho, as well also with purchasers of water contracts.

V.

Defendants further allege that on or about the first day of June, 1908, a drawing for lands under said segregation was held, at which persons desiring to purchase water rights and become settlers upon legal subdivisions of lands within said segregation were allowed to register and draw by getting numbers, which said numbers were placed in a barrel, and the first number drawn by any person designated said person as the first one to make a filing, the second number to make the second filing, and so on until all numbers were taken out of said barrel, and water rights were contracted to be sold at the sum of Forty ($40.00) Dollars per share, each share representing and entitling the purchaser to two and three-quarter (2¾) acre feet of water per acre of land, together with an undivided interest in the entire irrigation system.

Defendants further allege that the said Twin Falls Salmon River Land & Water Company, its duly authorized officers, agents and employees, did advertise and represent to persons, including those under whom these defendants claim title, that the lands within the boundaries of said segregation would be watered by diverting the waters of the Salmon River together with other water taken
72 by said company for use on the lands within said segregation, and did further represent as an existing fact that "the water supply for the Salmon project (meaning the segregation and lands involved in this action) is obtained from the Salmon River, which

has a vast drainage area in the Cassia National Forest, and the mountains of Nevada. The water right is without a flaw, there being no land susceptible of irrigation above the salmon tract and no water rights to contest. It carries sufficient water for the irrigation of more than One Hundred and Fifty Thousand ($150,000) acres in normal years, and, as a rule, the spring run-off is far greater than the amount of water required for the irrigation of the entire tract for the full season.

"Moreover, the lands under the Salmon system will not require nearly so much water as those under the original Twin Falls system, for the reason that there is much more precipitation on the Salmon Tract and consequently less evaporation. During the spring there are frequent showers on the Southern portion of the Salmon Segregation, which are dissipated by the time they reach the High Line Canal of the Twin Falls Project."

The said representations were false and deceptive. That, relying upon the truthfulness of said representations, defendants' predecessor did purchase the water rights involved in this action, and
73 enter into the contracts upon which recovery is sought in this action, and defendants did subsequently purchase from defendants' grantors their equity in the lands involved in, and described in plaintiff's Bill of Complaint, and said water rights, still relying upon the representations made, as aforesaid, under the original purchase of said lands, water contracts and rights, and that each and all of said representations were false and deceptive; that defendants' grantors, alienors, and assigns, as well as these defendants, relying upon said representations were deceived thereby.

VII.

Defendants further allege that pursuant to the representations of said Company, and relying upon the provisions of the laws of the United States, and of the State of Idaho, defendants' predecessors and grantors did enter into a certain written contract, referred to in plaintiff's Bill of Complaint, a true copy of said contract is hereto attached marked defendants' Exhibit "G," and is asked to be taken and read as a part of this answer.

VIII.

Defendants further allege that, as set forth in the Bill of Complaint, and as heretofore admitted in this answer, defendants' predecessors, grantors and alienators did, relying upon the representations of the Company, enter upon the legal subdivisions of land described in the Bill of Complaint, and did cultivate and irrigate portions of each subdivision, as required by the laws of the
74 State of Idaho, and did make proofs of the same, and did receive a final certificate of the completion, and full compliance with all of those matters and things required under the

laws of the State of Idaho, to entitle defendants' predecessors, alienors, as well as defendants, to title to said lands, in so far as the same could be conferred by the State of Idaho; that final certificate has been issued by the State of Idaho showing such compliance.

IX.

Defendants further allege that the representations made by the Company concerning the water rights of said Company, to the waters of Salmon River, were false in various particulars, including the fact that there did exist a prior water right to the waters of the said Salmon River in favor of the Vineyard Land & Stock Company, of Nevada, which said water rights take from the lands segregated, as hereinbefore set forth, and deprive said lands of the use of 12,500 acre feet of water, which said water right has been so adjudicated in a suit in the Federal District Court of the State of Idaho, between said Vineyard Land & Stock Company and "the Company."

X.

Defendants further allege that the contracts upon which this action is founded guaranteed the defendants' predecessors, alienors, and defendants, the carrying out and compliance with, on
75 behalf of "the Company," of the stipulations and agreements contained in the contract by "the Company" and the State of Idaho, and also the right to the use of certain waters other than Salmon River, on the lands within said Salmon River Segregation, including the lands against which this action is brought; that the representations as to there being certain waters which said Company had a right to apply to said lands, in addition to the waters of Salmon River, were false representations, and made for the purpose of deceiving and defrauding the purchasers under said contracts on which this action is founded, and did deceive and cause to be defrauded the said purchasers, and these defendants.

XI.

Defendants further allege that in the year 1918, as alleged in the original Bill of Complaint, the State Land Board of the State of Idaho did direct that the lands within the said Salmon River Segregation should be cut down to not exceeding 35,000 irrigable acres of land, and that the water in said system be applied to not exceeding 35,000 acres of land in a compact body, and did make application, according to the laws of the United States, to the Land Office of the United States Government, for patents for 35,000 net acres of land; that said action of said Land Board was taken at and upon the suggestion of the Commissioner of the General Land Office of
the United States Government, which said commissioner had
76 theretofore ascertained and concluded that no portion, or legal subdivision of the lands within said segregation, in-

cluding the lands involved in this action, had ever been furnished an ample supply of water in substantial ditches or canals, or by artesian wells or reservoirs, to reclaim any particular tract, or tracts, of such lands, so that a patent might issue from the United States Government to the State of Idaho.

XII.

Defendants further allege that under the contract between "the Company" and the State of Idaho, as well as under the contract between "the Company" and the purchasers of water contracts, it was the duty of "the Company" to furnish an ample supply of water in a substantial ditch or canal, or by artesian wells or reservoirs to reclaim a particular tract, or tracts, of land so that patents could issue for the same from the United States Government to the State of Idaho, regardless of settlement or cultivation by the purchasers of said water contracts and settlers on said lands; that the Company has not completed its said contract, and is not entitled to any liens whatsoever, either under the Statutes of the United States, the laws of the State of Idaho, or under the contract between the Company and the purchasers of water rights upon any particular subdivision of land, or the water rights dedicated to use on said lands,
77 until the said Company has actually furnished, as aforesaid, an ample supply of water in substantial ditches, or canals, or by artesian wells or reservoirs, to reclaim such particular tracts of land so that patents may issue therefor from the United States to the State of Idaho, and from the State of Idaho to the purchasers of said water contracts; that water contracts sued on in this action are worthless until the lands to which said water is dedicated is made appurtenant, and said lands reclaimed by "the Company" in compliance with the Statutes of the United States, and in accordance with the contracts made in pursuance of such Statutes between the Government of the United States and the State of Idaho; that the United States Government did, on April 10th, 1908, enter into its contract with the Sate of Idaho; that ten years have now elapsed since the lands in question were segregated by the Government of the United States, and that all lands under the Salmon River Segregation are subject to forfeiture to the United States Government by reason of the lapse of time, since this segregation was made, and that a period of less than three years remain under which the Secretary of the Interior can extend the time for the reclamation of the lands under said segregation, or of any of the lands under said segregation, or any subdivision of said lands; that all questions involved as between the plaintiff in this action and these defendants are founded upon the provision of the statutes of the United
78 States; that, by reason of the default of the Company in the performance of its obligations and duties, these defendants do no- owe anything upon the water contracts sued upon until the said Company, or someone on its behalf, has complied with the provisions of the Statutes of the United States, as in this paragraph set forth.

XIII.

Defendants further allege that under the contract of the 10th day of April, 1908, between the Government of the United States, and the State of Idaho, regarding the lands involved in this controversy, it is expressly provided that the said United States Government as,

"the said party of the first part contracts and agrees, and, by and with the consent and approval of Theodore Roosevelt, President thereof, hereby binds the United States of America to donate, grant and patent to said State, or to its assigns, free from costs for survey or price, any particular tract, or tracts, of said lands whenever an ample supply of water is actually furnished in a substantial ditch or canal, or by artesian wells or reservoirs, to reclaim the same, in accordance with the provisions of the said Act of Congress, and with the regulations issued thereunder, and with the terms of this contract, at any time within ten years from date of the approval of the said maps of the lands."

79 And it is further provided in said contract between the United States Government and the State of Idaho, as follows:

"It is distinctly understood and fully agreed that all persons acquiring rights to said lands in said state prior to the issuance of patets, as hereinafter mentioned, will take the same subject to all the requirements of said Acts of Congress and to the terms of this contract, and shall show full compliance therewith before they shall have any claim against the United States for a patent to said land."

That by reason of the failure and refusal of "the Company" to reclaim the lands involved in this action in the manner hereinbefore set forth, and as required by the laws of the United States, commonly known as the Carey Act and amendments thereto, these defendants are unable to acquire title to their lands through the State of Idaho from the United States Government, because of the fact that the United States Commissioner of the Land Office of the United States, and the Secretary of the Interior refuse to grant patents because of their findings, as a matter of fact, that the aforesaid provisions of the statutes of the United States requiring the reclamation of the said land, with an ample supply of water, have not been complied with in the reclamation of the lands on which, and to which,
80 the said contracts herein sued upon provide; that the water herein specified should become appurtenant; that said lands are arid and worthless without an ample supply of water applied to the same for the growing of crops, as required by the United States Statutes, commonly known as the "Carey Act" and the amendments thereto.

XIV.

Defendants further allege that under the rules and regulations of the General Land Office, as applied to states and territories, made in pursuance of the aforesaid Acts of Congress at Clause I, it is provided as follows:

"Under the provisions of the acts quoted except 'Fifth Amendment—Supplemental Acts', regulations and rules concerning which are given on page —) the state and territories are allowed ten years from the date of the approval for the application for the segregation of the lands by the Secretary of the Interior, in which to irrigate and reclaim them. The Secretary of the Interior may, however, in his discretion, extend the time for irrigating and reclaiming the lands for a period of five years, or he may restore to the public domain the lands now reclaimed at the expiration of ten years, or of the extended period."

That under Rule 12 of said Land Office Regulations, it is further provided:

"The affidavit of Form VII is required in order to show compliance with the provisions of the law, that an ample supply of water has been actually furnished in a substantial ditch or canal, or by artesian wells or reservoirs, for each tract in the list sufficient to thoroughly irrigate and reclaim it, and to prepare it to raise
81 ordinary agricultural crops. A separate statement by the State Engineer must be furnished, giving all the facts as to the water supply and the nature, location and completion of the irrigation works."

That as appears by said Rule 12, it was required of the Company that said Company "Prepare it (the lands involved in this action) to raise ordinary agricultural crops," and not the settler on said lands.

That it was further provided under Rule 18 of said Land Office that:

"Upon the receipt of the papers in the General Land Office such action will be taken in each case as the showing may require, and all tracts that are free from valid protests or contests, and respecting which the law and regulations have been complied with, will be certified by the Secretary of the Interior for approval and patented."

That it was, therefore, reserved to the Secretary of the Interior to pass upon the question as to whether or not the laws of the United States have ben complied with before the said Secretary of the Interior, or the United States Government, can issue a patent for any lands, or any subdivisions of land, under the segregation made of the public domain, in pursuance of the request of the Company, and its assignors, to the State of Idaho, and thereupon subsequently made by the State of Idaho to the Land Office of the United States.

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XV.

Defendants further represent that under Rule 6 of the State Board of Land Commissioners of the State of Idaho, governing the reclamation of lands under the Carey Act, it is provided:

"Lands will be open to entries from time to time as the construction of the work proceeds, and application by qualified persons to enter such lands will be received by the Board after notice has been given that the lands are open for entry. The Board will require a satisfactory bond in such sum as it may determine, from the party or parties constructing the irrigation works, to be deposited in the office of the Register, conditioned on the return to the applicants, with interest at six per cent per annum thereupon, of all payments made by them on account of water rights purchased for entries approved in advance of the availability of water, if the water for the irrigation of their entries is not available at the time, and in the manner stipulated in the agreement with said applicant."

And it was further provided in said Rule:

"If, however, said application shall not be approved by said Board, by reason of said Company failing to furnish water according to the terms in the contract with the entrymen, then all such contracts, payments, notes, mortgages, titles shall be returned to the entrymen."

Defendants further allege that each and every year since the opening of the said tract for settlement, to-wit: June, 1908, up to and including the year 1919, the Company, together with the
83 plaintiff and the said beneficiaries in said Deed of Trust, by virtue of and through their control of the Operating Company, have represented to these defendants, and to each and every settler within said segregation, and to each and every contract holder, that the reservoir of said Company contained given quantities of water sufficient to thoroughly irrigate certain areas of land within said segregation, and that given amounts of water would be supplied to each and every subdivision within said segregation upon which water contracts had been sold; that during each and every year from the year 1908, to and including the year 1919, the plaintiff, together with the beneficiaries under said Deed of Trust, and their officers and agents controlling the said Operating Company, have failed to furnish the supply of water which they represented would be supplied during the said respective years; that relying upon said representations these defendants have, from year to year, plowed, seeded and put to crops definite and certain acreages of land, and each and every year have had portions of said acreage so plowed, cultivated and seeded to crops, fail to mature crops for the sole reason that the plaintiff and its beneficiaries under said Deed of Trust, their officers and agents have failed, as above stated, to furnish water, as promised, in sufficient quantities to properly irrigate said

crops, whereby these defendants have each and every year been damaged and suffered great loss; that in addition thereto these de-
84 fendants have erected permanent improvements, including certain buildings, fences and the clearing of said lands, all of which will become a permanent loss to these defendants, unless said lands are reclaimed by "the Company," or someone on its behalf, by actually furnishing an ample supply of water for the reclamation of said lands, according to the statutes of the United States, hereinabove referred to as the "Carey Act," and according to the contract between the United States Government and the State of Idaho, to the total damage of these defendants, $—.

XVI.

Defendants further allege that "the Company," by reason of its outstanding stock, alleged to have been subscribed for and outstanding, amounting in the total to the sum of Five Hundred Thousand ($500,000) Dollars, and of its outstanding bonded indebtedness, as well also of its failure to carry out its contracts with these defendants and other settlers upon said segregation, is totally in solvent.

XVII.

Defendants further allege that there are other water supplies which were subject to filing and appropriation in the year 1908, and each and every year since that time, accessible to "the Company," and which waters could have been filed upon, and can yet be acquired, which, as defendants are informed, believe, and
85 therefore allege, are ample to supply all water contract holders under said Salmon River Segregation, including these defendants, for the thorough reclamation of lands under said segregation, and which would enable and entitle the settlers under said segregation holding lands to the amount of Sixty Thousand (60,000) acres, and over, including these defendants, to obtain title from the United States Government to the State of Idaho, and from the State of Idaho to these defendants, for the lands within the said segregation, including, as aforesaid, the lands involved in this action; that the use of said waters can be obtained and applied to the said lands at a sum not exceeding Seven Hundred and Fifty Thousand ($750,000) Dollars; that by the expenditure of said sum of money, and the diverting of said waters to the dam erected by "the Company," and the application of said waters to said lands, that not only can said lands be reclaimed, but that a net profit of between Four Hundred and Fifty to Five Hundred Thousand ($450,000 to $500,000) Dollars, can be derived by "the Company."

And defendants further allege that they are informed, and believe, and therefore allege, that there is now being made available another water supply of which "the Company" can avail itself, at considerable profit to the Company, adequate to thoroughly irrigate 25,000 additional acres upon the said Salmon River Segregation.

86

XVIII.

Defendants further allege, that by reason of the failure of the Company to reclaim the lands within said segregation, including the lands involved in this action, according to the provisions of the statutes of the United States, and of the contract between the United States Government and the State of Idaho, that portions of the lands and subdivisions of the same located in said Salmon River Segregation, have been without any water whatsoever during various years from 1908 up to and including the year 1919; that by virtue thereof, various subdivisions have been sold for taxes; that various other subdivisions have been abandoned; that the Secretary of the Interior and the State Land Board of the State of Idaho, have cruised and made surveys of said lands, both through agents of the United States Government, and of the State of Idaho, and as a result of said cruising and surveying, have selected a compact body of land under what is commonly known as "the Whiffen Report," and have recommended that the entire water supply from the dam constructed by the Company and conducted through canals and laterals of said Company, be appropriated and applied solely to the lands embraced within the selection known, as aforesaid, as within "the Whiffen Report," and if so applied, the Land Office of the United States has expressed its desire and willingness to recommend that the

87 Secretary of the Interior and the President of the United States, do grant to the State of Idaho the lands embraced in the said Whiffen Report, and to add to said lands other lands, if it should appear, as a matter of fact, that there is still water that can be applied to other lands within said segregation in ample quantities to actually reclaim the same, a full list of which said lands embraced within said Whiffen Report are hereto attached marked Defendants' Exhibit "H," and is asked to be taken and read as a part of this answer.

That different parts of the subdivisions of lands embraced in this action were eliminated by said "Whiffen Report," as not entitled to patents, because of lack of water supply, as heretofore particularly set forth.

XIX.

Defendants further allege that the Company, or someone on its behalf, can, as hereinabove set forth, acquire other water rights and apply them to the lands outside of the lands embraced in said Whiffen Report and thereby reclaim said lands embracing all of the lands for which outstanding water contracts still exist.

Defendants further allege that plaintiff has instituted in this Honorable Court in the neighborhood of eighty-eight (88) suits similar to this action, and as defendants are informed, believe, and therefore allege, in the neighborhood of Three Hundred (300) similar actions in the State Court of the Fourth Judicial

88 District of the State of Idaho, in and for the County of Twin Falls, and are threatening to bring other suits of a similar

character against approximately Three Hundred (300) other persons; that the same facts and circumstances exist in each and every of said suits now instituted, and which are threatened to be instituted, as hereinbefore set forth, upon the failure of the Company to actually furnish an ample supply of water to the lands involved in each of said suits, according to the statutes of the United States in such case made and provided, and in accordance with the contract between the United States Government and the State of Idaho, and between the State of Idaho and "the Company;" that it is necessary that accounts be taken, stated and inquiries made, concerning the various water rights and contract rights and of the availability of water from the Salmon River and other sources, and the proper application of water, and the apportionment of charges therefor; that in order that the rights of the respective parties purchasing and claiming water rights and equities in lands under said segregation be properly ascertained, and the waters of the Salmon River properly applied, and other waters acquired for the reclamation of the lands embraced under such water contracts, may be acquired, a receiver for the Company should be appointed, and the plaintiff and the beneficiaries under the Deed of Trust be required to show the amount actually expended by the Company, the amount
89 actually paid by them upon their alleged bonds, and the water contracts assigned to them; that receivers' certificates should be issued for the acquirements of additional water rights and the construction of proper dams, ditches, flumes and tunnels to convey said additional water to the dam and reservoir constructed by the Company, to be applied to the lands under the said Salmon River Segregation, and the cost thereof apportioned among the various water contract holders under said segregation, thereafter applied as to equity may seem meet and proper.

XX.

Defendants further allege that one A. C. Robinson is claiming to be the owner and assignee of certain of the bonds secured in the Deed of Trust hereinbefore mentioned, a copy of which is filed with this answer, marked Defendants' Exhibit "F" and of certain water contracts, and is attempting separate foreclosure proceedings in all respects similar to this action. And defendants further, upon information and belief; allege that the said A. C. Robinson has acquired whatever rights he may have as assignee in subordination to all rights and equities in said Deed of Trust; that the said A. C. Robinson is President of the said Twin Falls Salmon River Land & Water Company.

Defendants deny that complainant is entitled to any relief whatsoever, or any part of the relief in said Bill of Complaint de-
90 manded, and allege that complainant has no standing in this Court, or in any court.

XXI.

All which matters and things hereinabove set forth these defendants are ready and willing to aver, maintain and prove, as this Honorable Court shall direct.

Wherefore, Defendants pray that proper orders and decrees may be entered restraining and enjoining plaintiff, and A. C. Robinson, from any further proceedings in any State Court, or any other court, other than this Honorable Court, and that all actions instituted, or brought, by the plaintiff in this Court, or by said A. C. Robinson, for the purpose of foreclosing any and all liens of any character or nature whatsoever, growing out of and resulting from the segregation of that portion of the public domain known as the Salmon River Segregation, may be consolidated and heard along with this action.

II.

That orders and decrees be entered requiring plaintiff to convene before this Honorable Court, on the one side, all beneficiaries under the Deed of Trust executed by the Twin Falls Salmon River Land & Water Company on the 1st day of June, 1908, under which Deed of Trust plaintiff is acting as Trustee, as well also all alleged lien holders, including A. C. Robinson, and convene as parties
91 defendant all purchasers of water contracts and holders of lands, or equities in lands, under said Salmon River Segregation.

III.

That proper orders and decrees be entered adjudging the Twin Falls Salmon River Land & Water Company involvent, and appointing a receiver for the purpose of taking over all assets of said corporation, and substituting said receiver in the place and stead of the plaintiff in this action, with power and authority to bring such suits, and take such actions, and do such other things and acts as to this Honorable Court may seem just and proper, in the winding up of the business and affairs of the said Twin Falls Salmon River Land & Water Company, including the acquisition of such additional waters as can be acquired for the purpose of supplementing the waters of Salmon River in the irrigation of the lands within said segregation and the employment of contractors and others in the construction of such further works of diversion, storage and conducting of said waters to said lands as will reclaim so much of said lands as it may seem proper and just to reclaim, for which water contracts are now outstanding.

IV.

That orders and decrees may be entered ascertaining the respective titles, rights and interests of all persons claiming lands, or water rights, under and by virtue of water contracts, or settlements on

said lands, and properly apportioning and distributing all
92 liabilities, on all claims, as may be just and proper as between the beneficiaries under said Deed of Trust, and *interesse* as between said water contract holders and settlers.

V.

That all proper orders and decrees may be entered directing the application of water to such lands, or subdivisions, or tracts of lands, under said segregations, as will entitle lands, and subdivisions of lands, to the acquirement of patents from the United States Government.

VI

That defendants have such other further and general relief as the nature of their case may require, including their costs in this behalf expended, and that reasonable attorneys' fees be allowed for defendants' attorneys as to equity may seem just and proper.

TURNER K. HACKMAN,
Solicitor for Defendants.

Residing at Twin Falls, Idaho.

(Duly Verified.)

EXHIBIT "A."

Boise, Idaho, August 12, 1907.

To the Honorable State Board of Land Commissioners, sitting at Boise, Idaho:

The undersigned, George F. Sprague, C. B. Hurtt, H. L. Hollister and I. B. Perrine, citizens of the State of Idaho, respectfully
93 represent to your Honorable Board that they have been for some time engaged in surveying, estimating and making plans for the construction of extensive irrigation works in the County of Twin Falls, in this state, for the purpose of irrigating a large tract of arid land lying to the southerly of the South Side Twin Falls Carey entry. That they desire to, and with the approval of your Honorable Board will construct irrigation works which will cover and irrigate and render fit for farming and the growing of crops adapted to the climate of that locality upon said tract of arid land, covering and including an area of approximately one hundred fifty thousand acres.

That your petitioners request your Honorable Board to select and procure the segregation under the so-called Carey Act of Congress of the United States, the lands delineated on the map herewith marked Exhibit "A," and designated in the list of lands filed herewith, in order that the same may be reclaimed by the irrigation system so desired by your petitioners to be constructed.

Your petitioners further represent that if this application meets with the approval of your Honorable Board, that they will cause

to be organized a corporation with capital sufficient to complete said works and put the same in operation upon said entire tract within the period of five years from the date of the segregation of the said lands by the United States Government.

94 *Proposal.*

Your petitioners, and said corporation so to be formed, propose to construct any irrigation works necessary to properly irrigate for the growing of ordinary farm crops the lands shown on Exhibit "A," and scheduled in Exhibit "B," and also such State school lands, and Sections Sixteen (16) and Thirty-six (36), as lie within said tract.

The source of the water supply for such irrigation works and plant is a large area of mountainous country forming the water supply to the Salmon River, which rises near the borders of the states of Idaho and Nevada, together with the flow of water in said stream. Reservoirs are to be constructed, which will impound, hold and conserve all of the waters of said water-shed and drainage area, which by natural flow, will find their way to the bed of said stream, this impounding process to be continued throughout the year.

The location, situation and general dimensions of the irrigation works proposed are as shown by survey and plat delineated on Exhibit "A."

The estimated cost of the works when fully completed is three million dollars ($3,000,000.00).

Your petitioners propose to sell perpetual water rights, pursuant to the laws of this state and the said so-called Carey Act, for the sum of Forty Dollars ($40.00) per acre water right, the same to be paid for in five (5) equal annual installments, with in-
95 terest thereon from the date of purchase at the rate of six (6) per cent per annum until paid, the first installment to be paid at the time of the purchase.

The cost of annual maintenance shall be one dollar — ($1.35) per acre of land entered while the irrigation system is being operated by your petitioners or such corporation as shall be formed.

Your petitioners further represent that since their investigations and surveys have been under way, and while the plans herein set forth have been in process of formation, a considerable number of persons have made entry under the laws of the United States for lands within the area described and delineated on the plat Exhibit "A."

That your petitioners desire also to irrigate such lands at such prices as may be obtained for water rights from such private entrymen.

Your petitioners also desire to make to such entrymen, in order to protect your petitioners in the expenditure of the great fund necessary for the construction of the works indicated, an increased charge for shares or water rights in said irrigation system proportionate to the delay of such entrymen in securing such shares or water rights, and to discourage delays in acquiring water rights for the irrigation of land so entered by them, and request that they may

charge to such entrymen an increased cost per acre for shares or water rights sold to them for their said lands of one dollar and eighty cents ($1.80) per acre for the first year's delay, and
96 an additional one dollar and eighty cents ($1.80) per acre for each additional year of delay in application for the purchase or such shares for water rights.

That the name of such corporation so to be formed shall be the Twin Falls Salmon River Irrigation Company.

That the purpose of its incorporation shall be to acquire lands, water rights, to construct, operate and maintain irrigation canals, reservoirs, ditches and all things incident and appertaining to a large irrigation system, such as is indicated in this proposal, to borrow money upon the same, all to be in compliance with the said so-called Carey Act of Congress of the United States.

That the amount of capital stock of said corporation, fully paid up, shall be sufficient to construct complete and operate said irrigation works until the time shall arrive when the settlers upon said lands herein asked to be segregated shall take the said irrigation works under the said Carey Act.

The water right claimed for these lands is set forth in Permit No. —, granted and issued by the State Engineer of the State of Idaho, and the reservoir plans and sites for the impounding of the same are shown and delineated upon plats thereof accompanying this proposal.

Your petitioners represent that the time required for the construction of these works will be five (5) years from and after
97 the segregation of the lands by the Government of the United States and the making of the formal contract within the scope of this proposal with the State of Idaho.

GEO. F. SPRAGUE.
C. B. HURTT.
H. L. HOLLISTER.
I. B. PERRINE.

This indenture, made this 26th day of January, in the year of our Lord one thousand nine hundred and twelve, between John E. Hayes, of ——, County of ——, State of ——, the party of the first part and Twin Falls Salmon River Land & Water Company, (a corporation), the party of the second part.

Witnesseth, That the said party of the first part, for and in consideration of the sum of one dollar and other valuable consideration, lawful money of the United States of America, to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained and sold, and by these presents does grant, bargain, sell, convey and confirm unto the said party of the second part, and to its successors and assigns forever, all that certain permit issued by the State of Idaho for the appropriation of 1,500 cubic feet per second of the waters of Salmon River, Twin Falls County, State of Idaho, dated March 30th, 1907, Num-
98 bered 2659, and recorded in Book 8 at page 2659 of the Records of the State Engineer at his office in Boise, Idaho.

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining and the *revision* and *revisions,* remainder and remainders, rents, issues and profits thereof, and all estate, right, title and interest in and to the said property, as well in law as in equity, of the said party of the first part:

To have and to hold, all and singular, the above mentioned and described premises, together with the appurtenances, unto the party of the second part, and to its successors and assigns forever. And the said party of the first part, and his heirs, the said premises in the quiet and peaceable possession of the said party of the second part, its successors and assigns, against the said party of the first part, and his heirs and against all and every person and persons whomsoever, lawfully claiming or to claim the same shall and will warrant and by these presents forever defend.

In witness whereof, The said party of the first part has hereunto set his hand and seal the day and year first above written.

Signed, Sealed and Delivered in presence of:

JOHN E. HAYES. [SEAL.]
ANNA E. HAYES. [SEAL.]

99 STATE OF COLORADO,
City and County of Denver, ss:

On this 26th day of January in the year 1912, before me Josiah P. Smith, a Notary Public in and for said County, personally appeared John E. Hayes and Anna E. Hayes, his wife, known to me to be the persons whose names are subscribed to the within instrument and acknowledged to me that they executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

My Comm. expires Jan. 24, 1913.

[SEAL.]

JOSIAH P. SMITH,
Notary Public.

Received and filed for record in the office of the State Engineer at Boise, Idaho, at 9:30 A. M. Jan. 30, 1912.

A. E. ROBINSON,
State Engineer.

EXHIBIT "B."

Mr. Geo. F. Sprague,
Twin Falls, Idaho.

Boise, Idaho, Aug. 12, 1907.

DEAR SIR:

At your request I have made an investigation of the water supply of Salmon River, Twin Falls County, Idaho, to determine its sufficiency for the irrigation of a tract of about 150,000 acres of
100 land immediately adjacent to the reservoir of Salmon River, by which it is proposed to regulate and conserve the entire run-off of the stream.

The watershed of the Salmon River, tributary to the proposed reservoir, has an area of 1,740 square miles or 1,670,400 acres, all lying above an elevation of 5,000 feet and running up to an altitude of 8,000 feet or more. The surface is all of comparatively steep slope and is favorable to a heavy run-off. No measurements of the stream have been made in previous years, and the only actual records of flow available are those obtained during the present season, commencing March 7th, and continuing to July 1st. Using these records, which cover the flood period, and estimating the months of low water flow, the run-off for the year 1907 would be 591,000 acre feet, not including the peak of the flood from March 22nd to April 1st, which exceed- the gage heights and was not measured.

Another method of computing the run-off is by taking a percentage of the precipitation. The normal precipitation at Hailey, which has the same altitude as the lowest part of the drainage basin, is 18 inches, which would give a total precipitation of 1,670,400 acre feet. Allowing a run-off equal to 30 per cent. of the precipitation, would give an annual run-off of 501,120 acre feet, or a depth of run-off of 5.4 inches. For comparison, the Government records show the average run-off from the Boise River for the years
101 1896, 1897, and 1898 was 16 inches. For the same years the average run-off from the Snake River, above Montgomery's Ferry, was 5.3 inches, which did not include the water diverted for irrigation in the entire Snake River Valley, and including in the drainage area an enormous area of lava beds and sand plains from which there is no run-off at all.

It is proposed to irrigate 150,000 acres of land by utilizing the entire run-off of Salmon River. Allowing 2½ acre feet per acre actually applied to the land, a loss of 20% in distribution, and the probably storage losses, the irrigation of 150,000 acres would require 480,000 acre feet of water.

I am of the opinion that this would be an ample and even and excessive allowance for the irrigation of the tract in question. The altitude makes a short irrigation season, with some rain in the early part, and the nature of the soil and the slope favor a high duty of the water.

I consider that, with the full utilization by storage of the entire run-off of the stream, there will be an adequate and satisfactory water supply for the irrigation of 150,000 acres of land.

Very respectfully,

A. J. WILEY,
Consulting Engineer.

EXHIBIT "C."

Office of the State Engineer.

Boise, Idaho, August, 12, 1907.

To the Honorable State Board of Land Commissioners,
State Capitol, Boise.

GENTLEMEN:

Pursuant to the provisions of Section Nine of Chapter 11 of House Bill 143 (Sess. Laws, 1899, p. 286), approved on the second day of March, 1899, I have the honor to submit the following report on the proposal of George F. Sprague, C. B. Hurtt, H. L. Hollister and I. B. Perrine, relative to the segregation, reclamation and irrigation of certain lands, now a part of the public domain, said lands hereinafter described, being subject to segregation under the provisions of the Act of Congress approved August 18, 1894, entitled "An act making appropriations for sundry civil expenses of government for the fiscal year ending June 30, 1895, and for other purposes," (28 Stat. 372, 422), and other acts amendatory thereof.

The lands for which segregation is sought in the above mentioned proposal, are arid in character as contemplated in the Acts of Congress above cited and comprise 150,000 acres lying in townships 10 to 14 south inclusive and within ranges 14 to 18 east inclusive, Boise base and meridian. The northern line of the tract is contiguous to the southern line of the Twin Falls tract, the soils of the two being of the same general character as to fertility and certain
103 productiveness under irrigation. The general topography and natural facilities for irrigation are all that could be asked for.

The water supply will be taken from the Salmon River, the proposers holding a permit from this office to divert 1,500 cubic feet per second of time from that stream, together with all storm and flood waters. The Salmon River above the point of intended diversion has a drainage area of about 1,750 square miles, a good portion of which lies in the mountains where very heavy falls of snow occur each year. The waters available for the enterprise are unquestionably adequate for the purpose in hand and the right of the proposers is most excellent, legally considered, all adverse priorities being so small in the aggregate as to be negligible.

The proposed works will consist of a reservoir and diversion dam, tunnel, canals, and laterals necessary to deliver water to within one-half mile of each 160-acre tract of the lands to be irrigated. The dam will be located at a point where the Salmon River enters the canyon near the east line of Sec. 18, T. 14, S. R. 15, E. B. M. It is estimated that by means of this dam together with supplementary storage to be developed if necessary, over 400,000 acre feet of water can be impounded annually. The normal flow of the river will prove sufficient for all purposes probably until the middle of July, after which time the reservoir supply will be drawn on.

104 The estimated cost which has been fixed at $3,000,000.00 is I believe, fairly correct. This includes the building of the reservoir dam, tunnel, and all canals and laterals necessary to deliver water to within one-half mile of each 160 acre subdivision in the tract. A charge of $25.00 per acre for water rights under this project would, I believe be justified, owing to the expense to be incurred in transporting materials to the reservoir site which is about 40 miles from the nearest available railroad point. Should the plans of the proposers now under foot for the building of a railroad through the tract be realized, I believe that a charge of $40.00 per acre for water rights would be reasonable.

In conclusion I would say that, in my opinion, the project in question is one of unusual merit, and will prove a noteworthy success and a goodly increase to the irrigated area of the State, in the event of favorable consideration by your Honorable Board and the Honorable Secretary of the Interior.

Respectfully submitted.

JAS. STEPHENSON, JR.,
State Engineer.

EXHIBIT "D."

Articles of Agreement Between James Rudolph Garfield, Secretary of the Interior, for and on Behalf of the United States of
105 *America, and Frank R. Gooding, Governor and President of the State Board of Land Commissioners of Idaho, for and on Behalf of the State of Idaho.*

These articles of agreement, made and entered into this 10th day of April, A. D. 1908, by and between James Rudolph Garfield, Secretary of the Interior, for and on behalf of the United States of America, party of the first part, and Frank R. Gooding, Governor and President of the State Board of Land Commissioners for Idaho, for and on behalf of the State of Idaho, party of the second part,

Witnesseth, That in consideration of the stipulations and agreements hereinafter made, and of the fact that said State has, under the provisions of Section 4 of the act of Congress approved August 18, 1894, of the act of Congress approved June 11, 1896, of the act of Congress approved March 3, 1901, through James Stephenson, Jun., its proper officer, thereunto duly authorized, presented its proper application for certain lands situated within said State and alleged to be desert in character, and particularly described as follows, to-wit:

Segregation List No. 14.

(Here add list of lands and total area.)

These blanks should be left vacant by State Agent.

106 and has filed a map of said lands, and exhibited a plan showing the mode by which it is proposed that said lands shall

be irrigated and reclaimed, and the source of the water to be used for that purpose, the said party of the first part contracts and agrees, and, by and with the consent and approval of Theodore Roosevelt, President thereof, hereby binds the United States of America to donate, grant and patent to said State, or to its assigns, free from cost for survey or price, any particular tract or tracts of said lands, whenever an ample supply of water is actually furnished in a substantial ditch or canal, or by artesian wells or reservoirs, to reclaim the same, in accordance with the provisions of said acts of Congress, and with the regulations issued thereunder, and with the terms of this contract, at any time within ten years from the date of the approval of the said map of the lands.

It is further understood that said State shall not lease any of said lands or use or dispose of the same in any way whatever, except to secure their reclamation, cultivation, and settlement; and that in selling and disposing of them for that purpose the said State may sell or dispose of not more than 160 acres to any one person, and then only to bona fide settlers who are citizens of the United States, or who have declared their intention to become such citizens; and it is distinctly understood and fully agreed that all persons acquiring rights to said lands from said State prior to the issuance of
107 patent, as hereinafter mentioned, will take the same subject to all the requirements of said acts of Congress and to the terms of this contract, and shall show full compliance therewith before they shall have any claims against the United States for a patent to said lands.

It is further understood and agreed that said State shall have full power, right and authority to enact such laws, and from time to time make and enter into such contracts and agreements, and to create and assume such obligation in relation to and concerning said lands as may be necessary to induce and cause such irrigation and reclamation thereof as is required by this contract and the said acts of Congress; but no such law, contract, or obligation shall in any way bind or obligate the United States to do or perform any act not clearly directed and set forth in this contract and said acts of Congress, and then only after the requirements of said acts, the regulations thereunder, and this contract have been fully complied with.

Neither the approval of said application, map, and plan, nor the segregation of said land by the Secretary of the Interior, nor anything in this contract, or in said acts of Congress, shall be so construed as to give said State any interest whatever in any lands upon which, at the date of filing of the map and plan hereinbefore re-
ferred to, there may be an actual settlement by a bona fide
108 settler, qualified under the public land laws to acquire title thereto.

It is further understood and agreed that as soon as an ample supply of water is actually furnished in a substantial ditch or canal, or by artesian wells or reservoirs, to reclaim a particular tract or tracts of said lands, the said State, or its assigns, may make proof

thereunder and according to such rules and regulations as may be prescribed therefor by the Secretary of the Interior, and as soon as such proof shall have been examined and found to be satisfactory, patents shall issue to said State, or to its assigns, for the tracts included in said proof.

The said State shall, out of the money arising from its disposal of said lands, first reimburse itself for any and all costs and expenditures incurred by it in irrigating and reclaiming said lands, or in assisting its assigns in so doing, and any surplus then remaining after the payment of the cost of such reclamation shall be held as a trust fund to be applied to the reclamation of other desert lands within said State.

This contract is executed in duplicate, one copy of which shall be placed of record and remain on file with the Commissioner of the General Land Office, and the other shall be placed of record and remain on file with the proper officer of said State, and it shall be the duty of said State to cause a copy thereof, together with
109 a copy of all rules and regulations issued thereunder or under said acts of Congress, to be spread upon the deed records of each of the counties in said State, in which any of said lands shall be situated.

In testimony whereof, the said parties have hereunto set their hands, the day and year first herein written.

JAMES RUDOLPH GARFIELD,
Secretary of the Interior.

[SEAL.] STATE OF IDAHO,
By F. R. GOODING,
Governor and Chairman of State Board of Land Commissioners of the State of Idaho.

Approval.

To all to whom these presents shall come, Greeting:

Know ye that I, Theodore Roosevelt, President of the United States of America, do hereby approve and ratify the attached contract and agreement, made and entered into on the 10th day of April, 1908; by and between James Rudolph Garfield, Secretary of the Interior, for and on behalf of the United States, and F. R. Gooding, Governor, for and on behalf of the State of Idaho, under Section 4 of the act of Congress approved August 18, 1894, the act approved June 11, 1896, and the act approved March 3, 1901.

THEODORE ROOSEVELT.

110 March 20, 1908.

Whereupon the Board ordered that an opening be held under the Twin Falls Salmon River Land & Water Company's segregation some time between the 20th and 30th days of May, 1908, providing a sufficient amount of work is completed by that time.

GOODING.

Book 2, Page 128.

April 23, 1908.

Whereupon the Board ordered that the time for the throwing open for entry of 80,000 acres of land under the Twin Falls Salmon River Land and Water Company's project be fixed for June 1, 1908, and the maximum price of water for said land be fixed at $40.00 per acre.

GOODING.

Book 2, Page 134.

EXHIBIT "E."

This agreement, Made and entered into in duplicate this 30th day of April, 1908, by and between the State of Idaho, the party of the first part, through the State Board of Land Commissioners of said State, said Board consisting of Frank R. Gooding, Governor, Robert Landson, Secretary of State, John J. Guheen, Attorney General, and S. Belle Chamberlain, Superintendent of Public Instruction of said State and the Twin Falls Salmon River Land and Water Company, a corporation organized and existing under
111 the laws of the State of Delaware and duly authorized to do business in the State of Idaho (having complied with the laws thereof relative to foreign corporations) the party of the second part,

Witnesseth, that

Whereas, the party of the second part has succeeded to all the rights of C. B. Hurtt, George F. Sprague, I. B. Perrine and H. L. Hollister for the irrigation of lands in Twin Falls County, State of Idaho, which rights are evidenced by the proposal and Request heretofore made by them on the 12th day of August, 1907, which Proposal and Request were approved by the State Board of Land Commissioners of the State of Idaho on the 12th day of August, 1907, and

Whereas, all of the property rights and franchises of the said C. B. Hurtt, George F. Sprague, I. B. Perrine and H. L. Hollister acquired under and by virtue of the said accepted proposal and request have by the consent of the State Board of Land Commissioners been duly transferred to the party of the second part herein.

It is mutually agreed and covenanted as follows:

Purpose of the Contract.

1. That for and in consideration of the covenants of the said party of the first part herein contained, the party of the second part agrees to construct and build those certain irrigation works mentioned and described in the aforesaid Proposal and Request dated on the
112 12th day of August, 1907, and hereinafter more particularly described and to sell shares or water rights in said canal and irrigation system from time to time as hereinafter provided to the person or persons filing upon the lands hereinafter described and also to the owners of other lands not described herein but which are

susceptible of irrigation from this canal system or from any extension or enlargement thereof; said shares or water rights to be sold on the terms hereinafter provided and also to transfer the ownership, management and control of said canal system to the purchasers of shares or water rights as hereinafter provided.

General Specifications for Construction.

Reservoir.

II. The reservoir is to be formed by a masonry dam two hundred and ten feet in height, five hundred and fifty feet long on top, founded upon a solid rock foundation and extending from wall to wall of the lava Canyon on Salmon River in Section 18 Township 14 South of Range 15 East, Boise Meridian, in Twin Falls County, State of Idaho.

The reservoir formed by the dam will have a surface area of over three thousand acres, an available capacity of 180,000 acre feet and will extend southward from the dam a distance of approximately twelve miles.

113 Dam.

The dam will be constructed of rock solidly imbedded in concrete. Its top to be fifteen feet, its bottom width (210 feet below the crest) will be one hundred and nineteen feet; it will be built upon an arch of two hundred and twenty-five feet radius with a height and length as above specified.

Tunnels.

The water will be diverted from the reservoir through a tunnel ten feet by ten feet in Section equipped with suitable metal gates in concrete settings.

The first tunnel will be approximately 2,500 feet long followed by an open cut approximately 800 feet long which cut will be followed by a second tunnel of the same length and cross section as the first. The tunnels are to be concrete lined where necessary and to be built upon a grade of one in one thousand.

Canal.

Beyond the end of the second tunnel described above, the water shall be conveyed in open channels to the land to be reclaimed, using in part artificial channels and in part natural channels of suitable section grade and character of material. Both natural and artificial channels shall have a capacity of one-hundredth of one second *feet* of water for each acre of land served by them.

The main canal above the first point of distribution shall
114 have a capacity of one thousand second feet, which is likewise the capacity of the tunnel section.

The grade and cross sections of the canal may vary to suit the local

conditions and natural channels or coulees shall be utilized when suitable.

In earth sections, the main canal shall have a bottom width of thirty-two feet, a water depth of eight feet, the sides shall have slopes of three to one and the grade of the canal shall be one in five thousand.

Outlets from the main canal shall be built of concrete or other equally durable material with gates of wood or steel.

The canal system is to be surveyed and laterals are to be hereafter located, all entries of land being made subject to such location.

Changes in these plans and specifications may be made by second party with the consent of the State Engineer and the State Board of Land Commissioners.

Detailed plans will be hereafter filed with the State Engineer and with the State Land Board and when so approved shall become final.

Right of Way.

III. The said party of the first part grants to the said party of the second part a right of way across all lands belonging to the State of Idaho or that may be ceded to the State by virtue of the Act of Congress commonly known as the Carey Act or by any other
115 laws (and particularly the lands hereinafter described,) for the construction and operation of said canals, reservoirs and distributing system therefrom and for the necessary waste ditches which right of way shall be equal to the actual width of the canal, lateral or waste ditch, at its base from toe to toe of the embankment together with a strip of land along one side of such canal, lateral or waste ditch adjacent thereto not to exceed fifty feet in width along the main canal, thirty (30) feet in width along the laterals branching from said main canal and a proper width along the smaller laterals and waste ditches: said right of way to be located and designated by the Chief Enginer of the party of the second part and approved by the State Engineer and in all cases to be sufficient for ingress and egress along said canal, lateral or waste ditch in proportion as the necessity therefor exists and all water users on lands irrigated from said canal or laterals shall have such right of way as may be necessary from second party's canal or laterals to their own land in order to construct and maintain the necessary service ditches for their own use and such right of way across said land as may be necessary for waste ditches.

No more laterals, service or waste ditches shall be constructed across any premises than are necessary in the opinion of the Chief Engineer of the Company and the State Engineer. The laterals, service and waste ditches shall be constructed under the di-
116 rection of the Chief Engineer of the Company and subject to the approval of the State Engineer. In case any land owner is dissatisfied with the location of any service ditch across his premises, he shall have the right to appeal to the State Engineer whose decision shall be final.

Detailed maps showing the location of canal, laterals, reservoir and waste ditches shall be filed with the Board and with the State Engineer, but such filing need not be made prior to the lands being thrown open for settlement. No compensation shall be paid to land owners for the right of way herein provided for.

Appropriation of Water.

IV. The party of the second part is the owner of that certain water right evidenced by permit No. 2659 for 1,500 cubic feet per second of the waters of Salmon River in Twin Falls County, State of Idaho, issued by the State Engineer of the State of Idaho, to be used for the irrigation of the lands described in Exhibit "A" herewith, together with other lands susceptible of irrigation from said system, which water right is hereby dedicated for use upon said lands and it is agreed and understood that the dam hereinbefore mentioned shall be constructed so as to provide a reservoir for the impounding of 180,000 acre feet of water, which amount, in addition to the normal flow of the said stream during the irrigation period, has been determined to be sufficient to furnish two
117 and three-fourths acre feet of water per acre for each acre of land to be irrigated.

And the Second party promises and agrees to build and construct the canal and lateral system of sufficient capacity to deliver water to the users thereof at the rate of one-hundredth of a second foot per acre for each acre of land to be irrigated.

Entry of Lands.

V. Upon the execution of this contract and when the actual construction of said canal shall have been inaugurated the said party of the first part will, after notice given in conformity with law, throw open the hereinafter described lands or a specified portion thereof for settlement under such regulations as to the manner of said opening as shall be prescribed by the State Board of Land Commissioners.

Application for Lands.

VI. The said party of the first part through its State Board of Land Commissioners agrees that it will not approve any application for or filing on the lands hereinafter described until the person or persons so applying shall furnish to the said Board a true copy of the contract entered into with the party of the second part for the purchase of sufficient shares or water rights in said irrigation works for the irrigation of said lands; said shares or water rights to be evidenced by the Stock of the Salmon River Canal Company,
118 Limited, as hereinafter provided and the said second party stipulates and agrees that to the extent of the irrigation works and to the extent of the water rights to which it is entitled as rapidly as lands are open for entry and settlement, it will sell or contract to

sell water rights or shares for land to be filed upon by the qualified entrymen or purchasers without preference or partiality other than that based upon priority of application, it being understood, however, that priority of application or priority of entry or settlement shall not give any priority of right to the use of water flowing through the canal against subsequent purchasers but shall entitle the purchaser to a proportionate interest only therein, the water rights having been taken for the benefit of the entire tract of land to be irrigated from the system. The priority of application upon the opening days shall be determined by a system to be devised under the direction of the State Board of Land Commissioners.

Sale of Land by the State.

VII. That the said party of the first part, acting through its State Board of Land Commissioners, agrees to sell the lands herein described to such persons as are or may be by law entitled to file upon the same for the sum of Fifty cents ($.50) per acre, half of which sum shall be paid at the time of application for the entry of such lands made to said Board and the remaining one-half at the time of the making of final proof thereon.

119 Price of Water Rights.

VIII. Said party of the second part further agrees and undertakes that it will sell or cause to be sold to the person or persons filing upon any of the lands herein described or to the owners of any other lands not described herein but which are or may be susceptible of irrigation from its canal system by good and sufficient contract of sale with right of possession and enjoyment by the purchaser pending its fulfillment a water right or share in said canal for each and every acre filed upon or purchased from the State or acquired from the United States. Each of said shares of water rights shall represent a carrying capacity in said canal sufficient to deliver water at the rate of one-hundredth (1/100) of one (1) cubic foot of water per acre per second of time and each share or water right sold or contracted to be sold as herein provided shall also represent a proportionate interest in said canal and irrigation works together with all rights and franchises therein based upon the number of shares finally sold in said canal; said irrigation system, however, is to be built in accordance with the plans heretofore filed with the Board, which system, according to said plans, has been determined by the State Engineer to have the carrying capacity hereinbefore mentioned. Such water rights or shares shall be sold to the person or persons aforesaid for the lands hereinafter described or for
120 lands which are susceptible of irrigation from said system as follows:

To the person or persons filing upon any of said lands at a price not exceeding Forty Dollars ($40) per share to be paid for as follows:

One-fifth in cash at the time of sale and the remainder in five equal annual installments bearing interest at the rate of six per cent (6%) per annum payable annually. To the person or persons purchasing any portion of sections No. 16 or 36, which are susceptible of irrigation and reclamation from this canal at a price not to exceed Thirty Dollars ($30) per share provided said water rights are purchased within one year after the purchase of the lands from the State and not exceeding Forty Dollars ($40) per share at any time thereafter, said payments upon said State lands to be made one-seventh (1/7) at the time of purchase and the remainder in six (6) equal annual installments with interest thereon at the rate of six per cent (6%) per annum payable annually. In case the purchaser or entryman on desert lands, homestead lands or any lands other than those segregated under the Carey Act declines to purchase water rights within one year after the Carey Act lands are thrown open for settlement, the sum of two dollars and forty cents ($2.40) may be added to the price of water rights for each year's delay or fraction thereof. No charge shall be made for water rights for lands taken by the right of way for any railroad filing its
121 plat with the State Board of Land Commissioners prior to June 1, 1908, and all entries of land shall be made subject to such right of way.

This agreement shall not be construed to prevent the sale of shares or water rights on terms more favorable than those herein provided or to prevent the payment of installments on the purchase price in advance of maturity of the same at the option of the purchaser, but in no case shall water rights or shares be dedicated to any lands before mentioned or sold beyond the carrying capacity of the canal or in excess of the appropriation of water therefor.

Transfer of Possession and Management of Canal.

IX. It being necessary to provide a convenient method of transferring the ownership and control of said canal from the said party of the second part herein to the purchasers of water rights in said canal and for determining their rights among themselves and between said purchasers and the party of the second part herein; for the purpose of operating and maintaining said canal during the period of construction and afterwards for the purpose of levying and collection toll charges and assessments for the carrying on and maintenance of said canal and the operation and management thereof, it is hereby provided that as soon as said lands are ordered thrown open for settlement a corporation to be known as the
122 Salmon River Canal Company, Limited, shall be formed at the expense of the party of the second part, the articles of incorporation of said Company to be in substantially the form which is filed herewith and made a part hereof; that the authorized capital stock of said corporation shall be one hundred and fifty thousand shares (150,000) which amount is intended to represent one share for each acre of land which may be hereafter irrigated from said canal. The entire authorized amount of the capital stock of said

corporation shall be delivered to the party of the second part herein in consideration of the covenants and agreements herein contained in order to enable it to deliver to purchasers of water rights the shares of stock representing the same; said shares of stock, however, shall have no voting power and shall not have force and effect until they have been sold or contracted to be sold to the purchasers of land under this irrigation system. At the time of the purchase of any water rights or as soon thereafter as convenient, there shall be issued to the purchaser thereof one share of the capital stock of said corporation for each acre of land entered or filed upon; that the said party of the second part therein shall in case of said water rights or shares of stock are not fully paid for require the endorsement and delivery to it of said stock and shall at the same time require of said purchaser an agreement that until thirty-five per cent of the purchase price of said stock has been
123 paid, the said party of the second part therein shall vote said stock in such manner as it may deem proper at all meetings of the stockholders of said corporation and the said Salmon River Canal Company shall have the management, ownership and control, as above set out, of the said canal system as fast as the same is completed and turned over by it for operation by the said party of the second part, as hereinafter provided. Whenever it is certified by the Chief Engineer of the Company and the State Engineer that certain portions of said canal are completed for the purpose of operation, the same may, with the consent of the State Land Board be turned over to the Salmon River Canal Company, Limited, for operation. Such transfer and operation, however, shall not in any manner lessen the responsibility of the said second party with reference to the terms of the contract, nor shall such consent upon the part of the State Land Board be construed as a final acceptance of such portion of such canal, it being always understood that the acceptance of such canal must be in its entirety and that the bond given for the faithful performance of the said contract must be made and be liable for the substantial completion of the entire canal system.

Water Rights Dedicated.

X. The certificate of shares of stock of the Salmon River Canal Company, Limited, shall be made to indicate and define the
124 interests thereby represented in the said system, to-wit: A water right of one-hundredth of a cubic foot per second for each acre of land irrigated as provided in paragraphs IV. and VIII. of this contract and a proportionate interest in the said canal and irrigation works based upon the number of shares ultimately sold therein.

While the party of the second part shall retain control of the said Salmon River Canal Company, Limited, water shall be measured to users from the place of division at the main laterals of such irrigation system in such quantities and at such times as the condition of the crops and the weather may determine but according to such rules and

regulations, based upon a system of distribution of water to the irrigators in turn and by rotation as will best protect and serve the interests of all the users of water from said canal system.

It is agreed that said system of distribution by rotation shall be devised by the party of the second part and used by the Salmon River Canal Company, Limited, in case the necessity arises during the period while it retains the management of the Salmon River Canal Company, Limited.

The sale of the water rights to the purchasers shall be a dedication of the waters to the lands to which the same is to be applied. Water shall only be delivered through said irrigation system during the irrigation season, to-wit: between April 1st and November 1st
125 of each year. A domestic supply when necessary outside of the irrigation season shall be delivered under such rules and regulations and under such terms and conditions as shall be determined by said Salmon River Canal Company, Limited.

Management of Water and Charges for Delivery.

XI. The party of the second part agrees to construct the said canal system so that the water conducted through the same may be available at a point not to exceed one-half mile measured in a direct line from each quarter section of land therein described and to be irrigated and reclaimed by water conducted through said canals; that it will construct and place in position all head-gates, flumes, weirs and other devices for the control and measurement of water in the main canals and reservoirs and in the main laterals it being intended that the settler shall under the directions of the Chief Engineer of the second party build and furnish one gate or measuring device for his own use but that all other gates, weirs and measuring devices in the main canals, main or subordinate laterals shall be furnished and constructed by the second party.

Plans for measuring devices, head-gates and weirs are to be approved by the State Engineer. No charge shall be made to the purchaser for the delivery of water prior to the first day of January, 1911. For each succeeding year thereafter while the second
126 party retains control of the said Salmon River Canal Company, Limited, said company may charge and assess the purchasers of water rights in said irrigation system the sum of thirty-five cents ($.35) per acre for each acre of land for which a water right has been purchased; said sum to be due and payable on the first day of March of each year. If the sum so raised shall be insufficient prior to January 1st, 1913, for the purpose of maintaining, operating and keeping in repair said system and paying the expenses of the management thereof, the said second party will furnish the additional funds necessary to supply such deficiency. After said date, the actual cost of maintenance is to be paid by the settler.

A main lateral within the meaning of this contract, is a lateral taken from the main line of this canal. A subordinate lateral, within the meaning of this contract, is a lateral built for the purpose of

conducting water from a main lateral to a point within half a mile of the place of intended use. A coulee or draw used as a main lateral shall also be included within these terms.

Completion of System.

XII. Said party of the second part agrees to begin work on said irrigation system within six months from the date of this contract and to complete 1-5 of the construction work within two years from this date; that the construction work shall be prosecuted
127 diligently and continuously to completion and that a cessation of work under this contract for a period of six months after the second year without the sanction of the State Board of Land Commissioners will forfeit to the State all rights under this contract.

Second party agrees to have said canal system constructed in accordance with this contract within five years from the date hereof; it being understood, however, that detailed plans and specifications of said work have not yet been completed and that such detailed plans and specifications are to be approved by the State Engineer and that with his consent and the consent of the State Land Board alterations and changes may be made in the plans prepared and filed.

Forfeiture.

XIII. It is agreed that the rights of second party herein may be forfeited in accordance with the laws of the State of Idaho relative to that subject which are now in force and effect.

Estimated Cost.

XIV. The estimated cost of the proposed irrigation works is $2,500,000 and upwards and the price at which water rights are fixed herein and for which liens are hereby authorized and created against the separate legal subdivisions of land herein described are deemed necessary in order to pay the costs and expenses of reclamation and interest thereon. The existing laws under which this con-
128 tract is made are understood and agreed to be a part of this contract.

Description of Lands.

XV. The lands hereinbefore referred to are lands donated by the Act of Congress to the State of Idaho, under and pursuant to the Act of Congress approved August 18, 1894, and the Amendments relating thereto, commonly called the Carey Act, and also other lands hereinafter described, the irrigation and reclamation of which lands this contract is designated to effect. The lands to be reclaimed under said "Carey Act" are fully set forth in the list herewith marked Exhibit "A" which is hereby referred to and made a part hereof.

Highways.

XVI. Entries of land are understood to be made subject to a right of way without compensation to the entrymen, for roads upon all exterior section lines, and also upon all half section lines which may be designated by the Board of County Commissioners as may be provided by law.

Water Supply.

For Cities and Towns.

XVII. It is understood and agreed that so much water as may be necessary for the use of cities and towns and the inhabitants thereof, which cities and towns must necessarily take their water supply from said system of canals, shall be furnished from said canal system to said cities and towns and the inhabitants thereof, upon such terms of sale or rental as may be agreed upon by the party of the
129 second part and said cities and towns or the owners of the lands upon which the same are established or the inhabitants therein. Said cities and towns or the inhabitants thereof must contribute to the maintenance and support of said canal system in proportion to the amount of water used by them and shares of stock of the Salmon River Canal Company, Limited, shall be issued for the amounts of water represented by said use to the inhabitants thereof or to the trustees of any village or the mayor of any City in trust for the use and benefit of the towns and cities and inhabitants thereof.

Delivery of Water to Users.

XVIII. It is agreed that the said Salmon River Canal Company, Limited, shall not deliver water to or permit the use thereof from said irrigation system by persons who have not purchased water rights, or who are not holders of stock in said Salmon River Canal Company, Limited, or who are not otherwise entitled thereto under this contract.

Mortgage.

XIX. The right, title and interest of the second party in the irrigation works and system may be mortgaged, the form of such mortgage to be approved by the Attorney General of Idaho.

Amendments.

XX. This contract may be altered and amended by the first party with the consent of the second party for the purpose of carry-
130 ing out the object of the contract and for the purpose of meeting any conditions now unforeseen.

Detailed plans and specifications shall be filed from time to time as the work progresses with the State Engineer and the State Board for their approval.

With the consent of the State Land Board, the irrigation system hereby contracted for may be enlarged by second party so as to cover lands not under irrigation system, as at present designed, such extensions, however, to be a part of this system.

Coulees and Draws.

XXI. Coulees and draws may be used as waterways when convenient but all coulees and draws utilized as laterals from which water is to be taken by settlers for irrigation shall be so constructed and improved as to practically conform to artificially constructed laterals of like capacity so that water may be available for use from the same, in practically the same manner and at approximately the same expense, and it is further agreed that the specifications as to the construction and improvement of said coulees and draws shall be filed from time to time as the work progresses with the State Engineer and the State Land Board for their approval, it being understood that this paragraph is to be liberally construed in order that no unnecessary improvement of coulees need be made.

With the consent of the State Land Board, changes may
131 be made in the number, location and capacity of the reservoirs.

Whereas: All the requirements of the law have been, in so far as this contract is concerned, fully met and in every respect complied with, the execution of this contract is therefore ordered.

In witness whereof, the said party of the first part, the State of Idaho, has by resolution of its State Board of Land Commissioners caused this agreement to be signed in duplicate by its governor, who is ex officio president of said State Board of Land Commissioners and attested by the registrar of said Board.

And, the said party of the second part has hereunto caused its corporate name to be subscribed by its proper officer and to be duly attested, as provided by resolution of this Board of Directors.

STATE BOARD OF LAND COMMISSIONERS,
By F. R. GOODING,
Governor and ex-Officio President.

Attest:

M. I. CHURCH,
Registrar.

TWIN FALLS SALMON RIVER LAND AND WATER CO.,
By W. S. KUHN,
President.

Attest:

A. E. DE BOIS,
Assistant Secretary.

132 EXHIBIT "G."

Contract No. —.

Twin Falls Salmon River Land and Water Company.

Agreement.

This agreement, made in duplicate this — day of ——, 19—, between the Twin Falls Salmon River Land and Water Company (for convenience hereinafter called "the Company"), a corporation organized and existing under the laws of the State of Delaware, party of the first part, and —— —— (for convenience hereinafter called the "purchaser"), of ——, State of ——, party of the second part, witnesseth:

That the Company has heretofore entered into a contract with the State of Idaho, acting by its State Board of Land Commissioners, whereby the company bound itself to construct a system of canals and irrigation works for the reclamation and irrigation of certain lands therein described and referred to, which contract is of record in the office of the Register of the State Board of Land Commissioners at Boise City, Idaho, and is dated April 30th, 1908, and is hereinafter called the "State Contract."

133 That the Company has heretofore entered upon the work of construction of said irrigation system for the purpose of diverting from Salmon River the waters thereof under the appropriation of John E. Haynes, made December 29th, 1906, recorded in Book 8 of Water Rights, at page 2659, records of State Engineer's office of the State of Idaho, being permit No. 2659 issued by the State Engineer of Idaho, together with other water rights taken for use on the lands hereinafter described.

That the State Board of Land Commissioners, pursuant to law and its rule and regulations, has notified the Company that it may proceed to sell or contract rights to the use of water flowing and to flow through the canals and rights to and in said system of irrigation works, pursuant to law and to the terms of said contract with the State.

That the purchaser has made application to the Company to be permitted to purchase, upon the terms hereinafter set forth, the rights and privileges by said contract guaranteed, to the extent hereinafter named, which said application has been accepted by the Company subject to the approval of the State Board of Land Commissioners, whose approval, previous to the delivery thereof, has been by it Register endorsed hereon.

That in consideration of the sum of — Dollars, cash in hand paid this day by the purchaser to the Company and in consideration of the covenants and agreements hereinafter contained, it is

134 agreed that in pursuance of the contract between the Company and the State hereinafter called the State Contract that the purchaser shall become entitled to — shares of the capital stock

of the Salmon River Canal Company, Limited, the certificate thereof to be in the form as follows, to wit:

Salmon River Canal Company, Limited.

— shares. —— —, 19—.

This is to certify —— —— is the owner of — shares of the capital stock of the Salmon River Canal Company, Limited.

This certificate entitles the owner thereof to receive one-hundredth of a cubic foot of water per acre per second of time for the following described land:

.....
.....

in accordance with the terms of the contract between the State of Idaho and the Twin Falls Salmon River Land and Water Company and this certificate also entitles the owner to a proportionate interest in the dam, canal, water rights and all other rights and franchises of the Twin Falls Salmon River Land and Water Company, based upon the number of shares finally sold in accordance with the said contract between the said company and the State of Idaho.

135 SALMON RIVER CANAL COMPANY, LIMITED,

By —— ——,
President.

Attest:

—— ——,
Secretary.

Said certificate to be delivered as provided for in said State Contract and under the conditions therein stated.

The water which the purchaser shall have the right to conduct and receive through the said canal system shall be used upon and the water shall become dedicated and be appurtenant to the following described land and no other, to wit: Section —, Township — South, of Range — East, B. M., containing — acres in Twin Falls County, State of Idaho.

136 And the parties hereto expressly agree as follows, to wit:

1. This agreement is made in accordance with the provisions of said contract between the State of Idaho and the Company, which, together with the laws of the State of Idaho under which this agreement is made, shall be regarded as defining the rights of the respective parties, and shall regulate the provisions of the shares of stock to be issued to the purchaser by the Salmon River Canal Company, Limited.

2. The Company agrees that so long as it retains control of the Salmon River Canal Company, Limited, to wit, so long as it shall continue to vote a majority of the stock of said Company, as pro-

vided by the State Contract, that it will cause said Company to keep and maintain the said irrigation system in good order and condition and to cause any necessary repairs thereto to be made as soon as practicable and expedient.

Said Salmon River Canal Company, Limited, is to have power to levy all necessary tolls, charges and assessments upon all users of water in proportion to their respective holdings of stock, whether water is used or not, and the Company hereby agrees that no charges shall be made for the delivery of water from this date until after the first day of January, 1911, and that thereafter the annual charges for maintenance shall not, during the period prescribed in
137 the State contract, exceed the sum of 35 cents for each and every acre, to be charged against the entire acreage entered irrespective of the irrigation thereof. The purchaser agrees to pay said charges at the office of the Salmon River Canal Company, Limited, on the first day of April of each year without notice.

3. The consideration for the water rights hereby agreed to be conveyed is the sum of $—, and the balance thereof remaining due after the cash payment hereinbefore acknowledged, to-wit, the sum of $—, is due and payable as follows, to-wit:

	Due.	Principal.	Interest.	Amount.
1st Deferred Payment..	.....	$.....	$.....	$.....
2d Deferred Payment..	.....	.....	.....	.....
3d Deferred Payment..	.....	.....	.....	.....
4th Deferred Payment..	.....	.....	.....	.....
5th Deferred Payment..	.....	.....	.....	.....
6th Deferred Payment..	.....	.....	.....	.....
7th Deferred Payment..	.....	.....	.....	.....
8th Deferred Payment..	.....	.....	.....	.....
9th Deferred Payment..	.....	.....	.....	.....
10th Deferred Payment..	.....	.....	.....	.....
11th Deferred Payment..	.....	.....	.....	.....

Interest from —— —, ——, at 6 per cent per annum shall be paid annually but if interest is not paid within thirty days from the date the same falls due then in such case it shall be computed for the entire period at the rate of eight per cent per annum.

All interest accruing prior to the date on which notice is given to the entryman that the Company is prepared to furnish water under the terms of this contract is hereby waived.

138 4. The purchaser hereby covenants and agrees that upon default in the payment of any of the payments above specified, or of the interest thereon, or any annual charge, toll or assessment, for the operation and maintenance of the irrigation system hereinbefore provided for, the Company may declare the entire amount of the principal purchase price for said water rights, due, and may proceed either in law or in equity to collect the same,

and to enforce any lien which it may have upon the water rights hereby contracted, or upon the lands to which said water rights are dedicated or may at its option proceed to enforce any remedy given by the laws of Idaho to the Company against the purchaser.

And the purchaser hereby further covenants that he will and by these presents does hereby grant, assign, transfer and set over by way of mortgage or pledge to the Company to secure the payment of the amounts due and to become due on the purchase price of the water right hereby contracted to be sold any and all interest, and all rights which he now has or which may hereafter accrue to him under his contract with the State of Idaho for the purchase of the lands to which the water rights hereby contracted for are dedicated and further that immediately upon transfer to him of the legal title to said lands or any part thereof, he will, upon demand, execute to the Company, in proper form, a mortgage or deed of trust with
139 power of sale in such form as may be approved by the State Board of Land Commissioners to secure the performance by him of the provisions of this contract, which said mortgage the purchaser hereby covenants and agrees shall be a first lien upon the lands so mortgaged, superior to any and every incumbrance in favor of any persons whomsoever.

5. The purchaser agrees that the shares of stock purchased in the Salmon River Canal Company, Limited, shall be and they are hereby assigned and transferred to the Company and said Company and its agents are hereby authorized and empowered to vote said stock in such manner as it or its agents may deem proper at all meetings of the stockholders of said Company until 35 per cent of the purchase price of said stock has been paid.

6. It is agreed that no water shall be delivered to the purchaser from said irrigation system while any installment of principal or interest is due and unpaid from the purchaser to the Company or while any toll or assessment is due and unpaid from the purchaser to the Salmon River Canal Company, Limited. Water shall only be delivered through said irrigation system during the irrigation season, between April 1st and November 1st of each year. A domestic supply when necessary outside of the irrigation season shall be delivered under such rules and regulations and under such terms and conditions as shall be determined by said Salmon River Canal Company, Limited.

140–142 7. This contract may be assigned by the Company and thereupon the payment of principal and interest if so provided shall be due and payable to the assignee but the payments for tolls, assessments and charges for the delivery of water shall, unless otherwise provided, be paid to the Salmon River Canal Company, Limited, and payment thereof may be enforced by it.

8. This contract is made pursuant to and subject to the contract between the Company and the State of Idaho and the existing laws of said State.

The entry of the above described lands is made subject to the right-of-way of the Idaho and Nevada Southern Railroad Company, provided it has filed the map of its line with the State Board of Land Commissioners prior to June 1, 1908. No charge for a water right shall be made for the land taken for the right-of-way. No compensation shall be paid the entrymen for such right-of-way. The right-of-way shall not exceed one hundred feet on each side of the center line of the track.

9. All notices to second party by the State Board of Land Commissioners or by the first party hereto or its assigns may be sent to second party by mail addressed to.....

In witness whereof, the parties have hereunto subscribed their names, and the Company has caused its seal to be affixed the day and year above written in duplicate.

143 (Title of Court and Cause.)

Motion for Restraining Order, Bringing of Additional Parties as Defendants, Consolidation of Action, and Appointment of a Receiver.

Comes now the above named defendants and move this Honorable Court for an order and decree:

Restraining and enjoining the plaintiff from any further proceedings in any state court, or any other court, other than this Honorable Court and in this action, for the purpose of attempting to foreclose any liens of any character or nature whatsoever growing out of and resulting from the segregation of that portion of the public domain known as the Salmon River segregation and requiring that all actions now pending be consolidated and heard along with this action and that all contract holders or persons claiming water rights or interests in lands under said segregation, be
144 brought in and made parties defendant to this action.

And, that said order and decree provide for the appointment of a receiver for the purpose of taking charge of and obtaining possession of all of the property and effects of the Twin Falls Salmon River Land & Water Company and to perform and do such other things and acts in the premises as the Court may from time to time order and decree to be done by said receiver.

Dated this 16th day of September, 1920.

TURNER K. HACKMAN,
Solicitor for Defendants.

Endorsed: Filed Sept. 17, 1920. W. D. McReynolds, Clerk.

(Title of Court and Cause.)

Memorandum Decision.

Nov. 17, 1920.

Richards & Haga, Attorneys for Plaintiff.
Turner K. Hackman, Attorney for Defendants.

DIETRICH, *District Judge:*

The complaint in this case is identical in form with the amended complaint in Equity No. 513, brought by this plaintiff against A. E. Caldwell and others, and the question of parties which the
145 defendants here preliminarily raise by motion is in its main aspect the same as the question just decided in that case. In so far, therefore, as the motion seeks to have brought in as parties the other settlers, it must be allowed.

It is not apparent why the beneficiaries of the trust deed should be joined as plaintiffs; they are represented by their trustee, the plaintiff. General Equity Rule No. 37. Accordingly in this respect the motion will be denied.

Endorsed: Filed Nov. 17, 1920. W. D. McReynolds, Clerk.

In the District Court of the United States for the District of Idaho, Southern Division.

No. 513.

COMMONWEALTH TRUST COMPANY OF PITTSBURGH, a Corporation, Trustee, Plaintiff,

vs.

A. E. CALDWELL, NELLIE J. CALDWELL, and PETER MATSON, Defendants.

Decision.

Nov. 17, 1920.

Richards & Haga, Attorneys for Plaintiff.
James R. Bothwell and Sullivan & Sullivan, Attorneys for Defendants.

146 DIETRICH, *District Judge:*

The plaintiff is the trustee named in an instrument of trust given by the Twin Falls Salmon River Land & Water Company (a Carey Act promoting corporation), hereinafter called the Company, to secure a large issue of bonds. Under the terms of the instrument

and by virtue of special assignments, the trustee also holds as collateral security for the payment of the bonds the contracts taken by the Company from settlers, by which contracts rights in the irrigation system were sold to the settlers severally, and they in turn agreed to pay the stipulated price thereof at stated times, the Company being given a lien upon the water right and the land as security therefor. By assignment from their co-defendant Matson, the original entryman, the defendants, Caldwells, as settlers, took over four of these contracts, each covering a forty-acre right.

Payments not having been made as called for, this suit was commenced by the plaintiff to foreclose the liens provided for in the contracts. The complaint was filed December 14, 1914, and the Caldwells, appearing, filed separate answers, upon the 6th day of March, 1915. The cause was not brought on for trial upon the merits until the latter part of July, 1920. On the eve of the trial, July 29th, an amended complaint was filed, and on the same day jointly by the Caldwells an answer thereto, incorporated in which were
147 several amended counterclaims. To these counterclaims a reply was filed on July 29th, and an amended reply after the evidence was taken, namely, on August 23rd.

In the meantime, during the period intervening between the commencement of the suit and the trial, certain proceedings were taken touching the pleadings, more especially in relation to the defendants' counterclaims and the general defense that the plaintiff's assignor, the Company, had sold water rights greatly in excess of the capacity of the system or the water supply available therefor, and based upon their showing in this respect they moved for an order requiring the plaintiff to bring in as parties to the suit all the settlers holding outstanding contracts, to the end that the extent and dignity of their several rights might be conclusively defined, it being their contention that the amount justly due to the plaintiff is necessarily dependent upon the character of the water right actually available, a question which could not be fully determined without the presence of all others claiming the right to share in the available water supply. While recognizing the merit of the contention, with some hesitation I denied the motion, upon the ground that the issues thus presented were not suggested in the complaint, and that the cause of action pleaded by the plaintiff being merely for the foreclosure of a mortgage lien, it could not be compelled to bring in
148 other parties for the purpose of trying out a cause of action of the character suggested in the defendants' pleadings. The view then taken was that the suit was one strictly in foreclosure. In their brief opposing the motion for additional parties, counsel for plaintiff urged that it was "a suit to foreclose a mortgage on the land of A. E. Caldwell, and the question of parties must be determined with reference to the nature of the suit, for the rule as to parties and the issues that may be determined is exceedingly restricted in foreclosure suits." In denying the motion, it was said: "I am not without appreciation of the embarrassment, delay, and indeed the futility of litigation by piecemeal certain of the questions which are arising from time to time on the project, and I

have therefore given the defendants' motion for additional parties the most earnest consideration, but the obstacles to the course suggested are thought to be insurmountable. The issue to which the persons brought in would be parties is one which is raised, not by the plaintiff, but by the defendants, and primarily it is a question of the dignity and extent of the defendants' right and title; but the complaint is one in foreclosure simply, and the general rule is that issues of title cannot be tried out in a foreclosure case." It was added that seemingly it would be to the interest of all parties to have the question of the dignity and extent of the settlers' water rights determined once for all, and the suggestion was made
149 that in case a plenary suit were brought for that purpose foreclosure proceedings might properly be stayed pending a decision therein.

Subsequent observation and experience in relation to litigation growing out of the project have served to deepen the conviction that this question ought first to be conclusively adjudicated in a proceeding binding upon all interested parties. Out of it primarily the numerous suits now pending in this and the state courts have arisen, and because of it other cases in still greater number are likely to follow. And yet with all the litigation, some of which has been pending for an undesirable length of time, no real progress seems to have been made, owing to the want of necessary parties in any given case. From their attitude in this and other pending suits it is to be inferred that the plaintiff and the Company are, to say the least, disinclined to seek a general, binding adjudication. But with this issue unsettled it has become so manifest that a decree of foreclosure may do great injustice to one or the other of the parties, that a court of equity must seriously consider whether, to avoid such possible injustice to the defendant, it must not either afford to him an opportunity to have the requisite adjudication, or resolve such doubt as there may be in his favor; or decline to entertain the suit at all.

As already suggested, by its original complaint the plaintiff exhibited a case strictly in foreclosure, based upon written con-
150 tracts for the unconditional payment of specific sums of money, at stated times, and providing a lien as security therefor. There was not even an averment—unless it be by inference or implication—that the Company had performed or was able and willing to perform its obligations under the contract. Had such an allegation been made, and had the writings been pleaded in full, together with other uncontroverted facts, it would have appeared, that while the contracts between the numerous settlers and the Company are several, they are all of the same form and all refer to and adopt as a part of the agreement the contract betwen the Company and the State, and thus in a very substantial sense all the settlers are parties to one general contract, in the subject matter of which all are interested and by virtue of which all have rights so interdependent, whether they be regarded as joint or several, that the interest of one cannot be defined or adjudicated without affecting the interests of all others; hence an averment of due performance would in a general way tender the issue which the defendants have pleaded as an af-

firmative defense, and to that issue, it might with much reason be contended, all the settlers are necessary parties. But however that may be, it is thought that the amended complaint now presents such an issue. Plainly the case is no longer one strictly in foreclosure of a contract lien. While it may not be said that the original
151 cause of action has been expressly or entirely abandoned, it is completely overshadowed by a new theory resting upon additional, if not inconsistent, allegations of fact. In substance and bare outline the contention now pleaded is that the Company was induced to enter into the contract with the State to construct the irrigation system in question upon the assurance of the state officers that the natural water resources were adequate for the irrigation of 150,000 acres of land, and that in consideration of such assurance it undertook the construction of the system and agreed to sell water rights therein at the rate of $40.00 per acre, at which rate, it was estimated, sales for 150,000 acres would reimburse to it its necessary outlay for construction and other incidental expenses; that it necessarily spent in excess of $3,500,000.00 in carrying out its contract; that upon the request or demand of the state officials the acreage was reduced, first to 100,000 acres, then to 80,000 acres, and that more recently, after it had sold rights covering 73,000 acres, the State Land Board directed the cancellation of contracts aggregating 13,000 acres, with the result that at the present time there are outstanding contracts for only 60,070.8 acres, and that in a suit brought by the defendants here and other settlers it has been enjoined from executing any additional contracts; that still more recently, in March, 1918, the State Land Board entered an order directing that all of the water
152 available for the system be distributed to approximately 35,000 of the 60,000 acres for which contracts are outstanding; and that its lien upon contracts and the lands to which the water is distributable is the only resource to which it or its assignor can look for reimbursement. It then alleges: "That by reason of the actions of said State Board of Land Commissioners, as aforesaid, in cancelling and reducing contracts for the transfer and sale of shares or interests in said irrigation system and the injunction so issued and obtained by and at the instance of said defendants and other owners of land under said system, the Construction Company is prevented from supplying water to or obtaining a lien on more than 60,070.8 acres, and if the order of said State Board of Land Commissioners so made and entered on the 13th day of March, 1918, adjudging and determining that such water supply should be limited and confined to approximately 35,000 net irrigable acres be legal and valid, the moneys expended by the Construction Company in the construction of said irrigation system can only be recovered through or by the enforcement of its lien against such acreage; that if the irrigable acreage be limited and restricted to 60,070.8 acres, the actual cost and necessary expense of reclamation and reasonable interest thereon will amount to not less than $60.00 per acre, and in the event said acreage be further reduced, the cost per acre will be increased proportion-
153 ately." Thereupon it seeks to have charged against the defendants' lands a lien not only for the amounts which by

their contracts they agreed to pay, but for such an additional amount per acre as in the aggregate will fully reimburse the Company for its alleged outlay. In other words, notwithstanding the contract binding the settler to pay at the rate of $40.00 per acre, if it now turns out, that there is sufficient water for only 60,000 acres he must pay at the rate of $60.00 per acre, and if the supply is adequate for only 30,000 acres, then at the rate of $120.00 per acre. Obviously such an issue involves two general inquiries: If plaintiff is entitled to recover, and holds liens upon the settlers' lands for the Company's entire outlay, the amount of which outlay must first be determined; and if, as is the theory of the amended bill, this amount, whatever it may be found to be, is to be allocated pro rata to the acreage that is to have the beneficial use of the entire water supply, such area must be found both in amount and in definite location. Under such a theory it follows as of course that if the defendants' lands are to receive their due proportion of an adequate water supply, they are subject to a lien for the proportionate cost of the system. If upon the other hand they can and will be lawfully excluded from the area to which the water is to be supplied, by parity of reasoning they are under no obligation and are subject to no lien. Hence upon the face of the amended bill we have the fundamental and un-
154 avoidable question of the dignity and extent of the defendants' water rights, and that cannot be adjudicated without the presence of all claimants. Contracts for 60,000 acres are outstanding, all apparently valid and of the same dignity. The State Land Board has found that the available water supply is adequate for not to exceed 35,000 acres, and, according to the amended bill, has directed the cancellation of contracts covering 25,000 acres. If this finding prevails and the order of cancellation is valid, the 25,000 acres will, of course, get no water. It is significant that the plaintiff pleads neither the validity nor the invalidity of the order, and is silent upon the question whether or not the defendants' lands are within or without the favored area. Moreover, the amended bill, like the original, fails to contain any averment of full performance by the Company or of its ability and readiness to perform. True, there are averments to the effect that the construction work has been completed, and that "water" is available within a certain distance from each legal subdivision of the land. But how much water? Such pleading is not the equivalent of an allegation of due and complete performance.

But however that may be, it is not apparent how any conceivable averments the plaintiff might make touching these questions could dispense with the presence of the other settlers as parties. It has been held here and by the appellate court both that the Com-
155 pany's contract with the settler binds it to make available for his use a specific amount of water, and that it can have a lien only upon such lands as are or can be "reclaimed" thereby. An averment that defendants' lands are embraced within the 35,000 acre area and an admission by the plaintiff of the validity of the order of the State Land Board, would not necessarily warrant a de-

cree against the defendants, either upon the original theory that they are bound by the contract to pay at the rate of $40.00 per acre, or upon the present theory that they are, as owners of 160 acres, under obligation to pay a proportionate part of the cost of the system, for the reason that the plaintiff's admissions in these respects are not binding upon the settlers who are not parties hereto and whose interests would be prejudicially affected by such a holding. If the defendants' lands are included in the 35,000-acre tract, before they can be justly required to pay for a full water right, whether upon one theory or the other, they are entitled to have the assurance either of a voluntary relinquishment from the excluded settlers or an adjudication binding upon them, extinguishing their claims.

It is hardly necessary to say that it is not intended to intimate any view as to the merits of the theory upon which the amended complaint is framed. Whether with or without merit, it presents for adjudication an issue to which all the settlers are indispensable
156 parties, for upon it any decree that may be entered will necessarily affect the interests of absent claimants and may be inconsistent with equity and good conscience.

It is immaterial that the defendants have failed to raise the point by renewing the motion which they made against the original complaint. It is a question of jurisdiction, of which the Court must take cognizance. Courts of equity have not the power to enter a decree in the absence of an indispensable party, whose rights must of necessity be affected thereby. Shields v. Barrow, 58 U. S. 129, 140. In view, however, of the fact that the precise question has not been argued, and of its great importance, I shall be very willing to give it reconsideration upon a petition for rehearing or in any other manner upon which counsel may agree. No course is now apparent upon which we can proceed without violating fundamental principles of justice, but possibly one can be suggested. In the absence of such suggestion, the order must be either that the requisite parties be brought in or the cause be dismissed.

Endorsed: Filed Nov. 17, 1920. W. D. McReynolds, Clerk.

(Title of Court and Cause.)

Order.

The plaintiff having heretofore filed herein a petition
157–168 for rehearing, and thereafter, by agreement of counsel, the matter having come on for hearing in open court, and the plaintiff having submitted further argument upon the merits, and the Court being fully advised, and finding no reason for modifying the original decision;

It is therefore ordered that said petition for rehearing be, and the same is, hereby denied. Plaintiff is given thirty days for pleading further.

Dated this 14th day of December, 1920.

FRANK S. DIETRICH,
Judge.

Endorsed: Filed Dec. 14, 1920. W. D. McReynolds, Clerk.

(Title of Court and Cause.)

No. 743.

Order of Dismissal.

Plaintiff, through its solicitors, having advised the Court that it declines to plead further in this cause by adding additional parties as directed by the decision rendered herein on November 17, 1920;

It is therefore ordered, That the complaint herein be, and the same hereby is, dismissed at Plaintiff's costs but without prejudice to another action.

Dated this 27th day of December, 1920.

FRANK S. DIETRICH,
District Judge.

* * * * * * *

169 United States Circuit Court of Appeals for the Ninth Circuit.

No. 3625.

COMMONWEALTH TRUST COMPANY OF PITTSBURG, a Corporation, Trustee, Appellant,

vs.

MAX SMITH and MARGARET SMITH, Appellees.

Upon Appeal from the United States District Court for the District of Idaho, Southern Division.

Proceedings Had in the United States Circuit Court of Appeals for the Ninth Circuit.

Richards and Haga, Attorneys for Appellant, Boise, Idaho.
Turner K. Hackman, Attorney for Appellees, Twin Falls, Idaho.

169½ At a stated term to wit, the October term, A. D. 1920, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the court-room thereof, in the city and county of San Francisco, in the State of California, on Monday, the twenty-first day of February, in the year of our Lord one thousand nine hundred and twenty-one.

Present:

The Honorable William B. Gilbert, Senior Circuit Judge, Presiding.
The Honorable William H. Hunt, Circuit Judge.
The Honorable Charles E. Wolverton, District Judge.

No. 3625.

COMMONWEALTH TRUST COMPANY OF PITTSBURG, a Corporation, Trustee, Appellant,

vs.

MAX SMITH and MARGARET SMITH, Appellees.

Order of Submission.

Ordered appeal in the above-entitled cause argued by Mr. Oliver O. Haga, counsel for the appellant, and by Mr. Turner K. Hackman, counsel for the appellees, and submitted to the Court for consideration and decision.

170 At a stated term, to wit, the October term, A. D. 1920, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the court-room thereof, in the city and county of San Francisco, in the State of California, on Monday, the sixteenth day of May, in the year of our Lord one thousand nine hundred and twenty-one.

Present:

The Honorable William B. Gilbert, Senior Circuit Judge, Presiding.
The Honorable Erskine M. Ross, Circuit Judge.
The Honorable William H. Hunt, Circuit Judge.

In the Matter of the Filing of Certain Opinions and of the Filing and Recording of Certain Judgments and Decrees.

By direction of the Honorable William B. Gilbert, and William H. Hunt, Circuit Judges, and the Honorable Charles E. Wolverton, District Judge, before whom the causes were heard, ordered that the typewritten opinion this day rendered by this Court in each of the following-entitled causes be forthwith filed by the Clerk, and that a Decree or Judgment be filed and recorded in the Minutes of this Court in each of the said causes in accordance with the Opinion filed therein: * * *

No. 3625.

COMMONWEALTH TRUST COMPANY OF PITTSBURG, a Corporation, Trustee, Appellant,

vs.

MAX SMITH and MARGARET SMITH, Appellees.

170½ In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 3625.

COMMONWEALTH TRUST COMPANY OF PITTSBURG, a Corporation, Trustee, Appellant,

v.

MAX SMITH and MARGARET SMITH, Appellees.

Richards & Haga and A. N. Edwards for Appellant;
Turner K. Hackman for Appellees.

Before Gilbert and Hunt, Circuit Judges, and Wolverton, District Judge.

This is a suit to foreclose a lien upon certain water-rights and privileges and the real property to which they are appurtenant. It is necessary to understand the controlling issues presented by the pleadings for an intelligent solution of the problem involved. The bill of complaint proceeds upon facts which will be as briefly epitomized as is consistent with clarity.

About August, 1907, the State of Idaho, through its State Board of Land Commissioners, made application to the Secretary of the Interior, under what is known as the Carey Act and acts amendatory thereof, for a segregation from the public domain of ap
171 proximately 127,707.29 acres of desert land situated in Twin Falls County, Idaho, which lands and other lands in the vicinity to the amount of about 150,000 acres in the state represented could be irrigated and reclaimed from the surplus and unappropriated waters of Salmon River, by means of a storage reservoir with an available capacity of 180,000 acre feet, and requisite canals, ditches, laterals, etc. Prior to the making of such application, the state engineer and the state board determined and adjudged, in pursuance of state laws and regulations, that there was sufficient surplus and unappropriated water in Salmon River available for reclamation of said lands to the extent and degree required by the acts of Congress; and the Secretary of the Interior, having also determined that the supply of water was sufficient for the purposes desired, did, on the 10th day of April, 1908, segregate from the public

domain and agree to donate, grant and patent to the state the desert lands described in the application, in the aggregate mentioned and for the purposes as prayed, as contemplated by the acts of Congress and the laws of the state relating to such matters.

About April 30, 1908, the Twin Falls Salmon River Land & Water Company, herein to be called the construction company, entered into a contract with the State of Idaho, through its board of land commissioners, for the construction of the reservoir, and the necessary tunnels, ditches, etc., to complete the project. In entering into such contract, the construction company, upon the determin-
172 -tion of the state and of the Secretary of the Interior that the flood and unappropriated waters of Salmon River available for the project were ample to reclaim the lands to the extent and degree required by the acts of Congress and the laws of the state, agreed to accept as its compensation for constructing the system the lien authorized by the acts of Congress to be created by the state on and against the Carey act lands, and the lien authorized to be created by the laws of the state, and the consideration that should or ought to be paid under said acts and laws of the state by entrymen and owners of lands for an interest in the irrigation system and water rights. Under the contract it was determined and agreed that the actual cost of the irrigation works and structures would be the sum of $40.00 per acre when apportioned and distributed equally over the whole 150,000 acres proposed to be reclaimed, and a lien was created by the state in favor of the construction company for actual costs and necessary expenses of reclamation and reasonable interest thereon, estimated at $40.00 per acre, against each and every legal subdivision segregated from the public domain under the Carey act pursuant to the state's application. It was further provided in the contract that upon payment of $40.00 per acre or share in the irrigation system, together with interest thereon, the lien should be satisfied.

It was further provided that a corporation to be known as the Salmon River Canal Company, Limited, herein to be called the operating company, should be organized to take over the man-
173 agement and operation of the irrigation system, which should be capitalized on the basis of one share of stock to each acre of land to be irrigated under the system, namely, 150,000 shares, and that there should be issued to entrymen or purchasers of the lands as evidence of their respective shares or interests in the irrigation system one share of stock for each acre entered or filed upon and susceptible of irrigation from the system, and that the water available therefrom and for distribution should be distributed in accordance with the number of shares of stock held in the operating company by entrymen or owners under the system.

Relying upon the correctness of the determinations of the state and the Secretary of the Interior as to the sufficiency of the water supply available, and believing that they were final and binding, the construction company entered upon the work of construction, and thereafter built and constructed the irrigation works theretofore approved by the state, at an expense believed to be $3,500,000. Such works, it is alleged, have been accepted and approved by the

state as completed, and water has been available from the system for the irrigation of the lands described since April 12, 1911, at a point within one-half mile of the lands and premises.

After the construction company had commenced the work of construction, the state demanded that the transfer of shares be limited so as not to exceed 100,000 acres and later 80,000 acres, and that the water supply be distributed over and made appurtenant to not more than that number of acres.

174 Immediately after the execution of the contract, the state board of land commissioners gave public notice that the lands so segregated were open to settlement, and of the terms upon which land could be entered or title acquired, that the construction company was authorized to transfer and issue water-rights, shares or interests in the system to qualified entrymen, and that the lands could not be entered until the entryman had entered into a contract with the construction company for the transfer to him for use upon such lands of shares or interests in the works as contemplated by the contract between the construction company and the state.

The state board adopted and approved a form of contract to be used by the construction company for the transfer of shares or interests in the irrigation system to entrymen and owners of lands thereunder, and it was provided therein how the $40.00 consideration and interest thereon to be paid for each share should be paid, with a further provision that if the purchaser made default in the payment of any installment of principal or interest, the construction company might declare the entire amount of the purchase price at once due and collectible, and proceed either at law or in equity to enforce any lien it might have upon the water rights, shares or interests to be transferred under such contracts, and upon the land to which the same were appurtenant, and to enforce any other remedy it might have; it being asserted that under the contract the

175 purchaser granted, assigned and set over, by way of mortgage or pledge to the construction company to secure the amounts due and to become due, the lands to which the water rights, shares, and interests were dedicated, and that the company was given a first and prior lien upon such lands, water rights, shares and interests, and as additional security that the entryman agreed that shares of stock issued to him should be and were by the terms of the contract assigned to the construction company.

The construction company used the form of contract approved by the state board, and all contracts after execution were submitted to and approved by such state board.

It is further asserted that, by virtue of the acts of Congress, the laws of the state, the contract between the construction company and the state, and the settlers' contracts, the construction company became entitled to and possessed of a lien against the lands segregated from the public domain for the actual costs of constructing the irrigation system, and the necessary expenses of reclamation, and reasonable interest thereon; also of the lien created by the laws of the state in favor of companies constructing irrigation works; and that the settlers' contracts were intended to render more specific the lien created

under the acts of Congress and the laws of the state, and the lien created thereby was intended to be supplementary to and not in lieu of the lien created by the federal and state laws.

After the state had given notice, as previously stated, the
176 construction company accepted applications for entry, and entered into settlers' contracts and contracts with owners of other desert lands situated under the system, covering approximately 73,000 shares; all of which were approved by the state board; but thereafter, in the year 1916, the state board, in the exercise of its supervisory power over such matters, cancelled and annulled entries aggregating approximately 13,000 acres, and thereafter reduced the acreage entitled to water and the number of outstanding shares or interests in the system to approximately 60,070.8, and declined to approve any further contracts, and the defendants in the suit and other owners of land under and shares of stock in the system have combined to reduce the acreage for which water shall be supplied, and have obtained an injunction in the case of A. E. Caldwell, et al. against the construction company and others, prohibiting the company from selling or transferring any further shares in the irrigation system, and decreeing that the water supply available be distributed over not to exceed 60,070.8 acres; and plaintiff is advised that the state board, about March 13th made an order that the water available for distribution should be made appurtenant to approximately 35,000 net irrigable acres, and no more, and that the outstanding shares in the system in excess of that should be cancelled or reduced accordingly, though no action for reduction has been taken or had. It is asserted that, by reason of the action of the state board and the injunction as aforesaid, the construction company is prevented from supplying water to or obtaining a lien upon more than 60,070.8 acres, and if the later order of the state board made March
13, 1918, be legal and valid, the money expended by the con-
177 struction company in the construction of the irrigation system can only be recovered through or by the enforcement of its lien against 35,000 acres; that if the irrigable acreage is limited to 60,070.8 acres, the actual cost and necessary expense of reclamation and reasonable interest thereon will amount to not less than $60.00 per acre, and in the event the acreage be further reduced, the cost per acre will be further increased.

In pursuance of the notice published, as alleged, persons having the required qualifications made application to the construction company for the purchase of shares in the irrigation system, under the form of contract prescribed by the state board, and the construction company accordingly entered into contracts with such persons, which were approved by the state board. The entries were so made, and the entrymen, after having reclaimed and made settlement upon the lands so entered, made final proof of reclamation and settlement in the manner required by statute and the rules and regulations of the board, which was also accepted, allowed and approved by the board.

Plaintiff alleges that the entrymen, their successors and assigns have failed to pay and discharge the lien thus created in favor of

the construction company, and that because of such default plaintiff has elected to declare the whole amount, both principal and interest, remaining due and unpaid on such liens, as immediately due and payable, and claims a first and prior lien against the lands and water rights, shares and interests appurtenant thereto
178 for the actual costs and necessary expenses of reclamation and reasonable interest thereon.

The complaint sets forth the specific demands against the defendants Max Smith and Margaret Smith, the subdivision of land against which the liens are claimed, and the amount thereof. Then it is further alleged that the amount due against each of said legal subdivisions should be increased by $20.00 per share for the number of shares dedicated or made appurtenant to said land; and in case it be determined that the number of shares or interests outstanding against the system should be restricted to less than 60,070.8 acres, then that the amount due on each of the shares and the amount of the lien should be increased proportionately, to the end that each acre of land entitled to water shall pay its proportionate part of the actual cost of said works and the necessary expenses of reclamation as provided by the acts of Congress and the laws of the State of Idaho.

The prayer proceeds as in the ordinary foreclosure.

The answer of defendants admits in large measure the allegations of the complaint, but in many things enters denial, and in others puts the complainant upon proof. Some of the demands are of matter that would appear to be vital to the controversy. For instance, the defendants deny that the irrigation works were accepted and approved by the state as completed prior to the commencement of this suit; deny that the entrymen, their successors, grantees or assigns have failed to discharge any liens created in favor of the construction company against said lands, or have failed to
179 pay any installments of principal or interest as the same became due or at all, and in that connection allege that the construction company has failed to comply with the laws of the United States by furnishing an ample supply of water in a substantial ditch or canal to reclaim the particular tract or those particular tracts of land as required by the statute and involved in this action, or as required by the contract between the general government and the State of Idaho, and the contract between the state and the company, and deny that plaintiff is entitled to a first lien or any lien at all against the lands in the complaint described, or against the water rights, shares or interests appurtenant thereto, under the acts of Congress or the laws of the state or the settlers' contracts, or any lien at all for the actual costs and necessary expenses of reclamation, or reasonable interest thereon, or for any sum of money, or at all, until the construction company shall have actually furnished an ample supply of water in a substantial ditch or canal, or by artesian wells or reservoirs, to reclaim the lands, and then only a lien for the security of the payment of $40.00 per share per acre of land.

By affirmative allegations, the answer reiterates the history of the construction of the irrigation works and asserts that a fraud was

practiced by the construction company and its promoters in acquiring the right to the construction of the works, and that the settlers were induced to enter into their contracts by misrepresentation and fraud, and in short challenges any recovery in behalf of the company or its assigns on account of the so-called liens.

The pleadings being thus formulated, the court on motion of defendants directed that all contract-holders or persons claim-
180 ing water-rights or interests in lands under the segregation be brought in and made parties to the action; and, plaintiff having failed to comply with the order, the cause was dismissed, from which decree the plaintiff appeals.

WOLVERTON, *District Judge:*

The single question presented by the appeal is whether the contract-holders or the persons claiming water-rights or interests in the lands comprised by the project or irrigation system are indispensable parties to the suit, so that the court is unable to proceed in their absence without injuriously affecting them in their rights and privileges. If this is merely a proceeding for the foreclosure of a mortgage lien, and nothing more, then it may confidently be premised that the other contract-holders within the project should not be required to be brought in, because they are neither necessary nor indispensable parties, nor is it competent in the ordinary bill of foreclosure to litigate the title of parties claiming adversely to the mortgagor. Dial v. Reynolds, 96 U. S. 340; Peters v. Bowman, 98 U. S. 56.

Indispensable parties are defined as "persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience." Shields v. Barrow, 17 How. 130, 139.

So it is said in Williams v. Bankhead, 19 Wall. 563, 571:

181 "Where a person will be directly affected by a decree, he is an indispensable party, unless the parties are too numerous to be brought before the court, when the case is subject to a special rule."

A bill to rescind affords an apt example of the kind. All parties to the contract sought to be annulled must needs be indispensable parties.

The right of the construction company or its successor, the applicant here, to foreclose its liens is controverted on the ground that the company has not performed its part of the contract with the settlers whereby its liens were acquired; in other words, that its right to enforce the lien depends upon certain conditions to be performed upon its part, which are conditions precedent to any right of action against the settler to compel him to perform.

It is stipulated between the parties in the settlers' contract for the purchase of shares or interests in the irrigation system that the agreement is made in accordance with the provisions of the con-

tract between the State of Idaho and the company, which, together with the laws of the State of Idaho under which the agreement is made, shall be regarded as defining the rights of the respective parties, and shall regulate the provisions of the shares of stock to be issued to the purchaser by the operating company.

This renders it essential, in order to arrive at the correlative obligations of the parties, to read the settlers' contract in connection with the contract between the construction company and the
182 state, and the state laws relative to the subject; and not only this, but in connection with the statutes of Congress rendering such a project possible. Twin Falls Salmon River Land & W. Co. v. Caldwell, 242 Fed. 177, 190.

Under the contract between the state and the construction company, the company agrees to build the irrigation works and to sell shares or water-rights as provided to the person or persons filing upon the lands; also to the owners of other lands not described which are susceptible of irrigation from the system; the shares or water-rights to be sold on terms provided, and the management and control of the canal system to be transferred to the purchasers of such shares or water-rights.

The construction company represents that it is the owner of 1,500 cubic feet per second of the waters of Salmon River, and agrees that the dam to be constructed shall provide a reservoir for impounding 180,000 acre feet of water, and that it will construct the canal and lateral system of sufficient capacity to deliver water to the users at the rate of one-hundredth of a second foot per acre for each acre of land to be irrigated.

The construction company further agrees that, to the extent of the irrigation works and to the extent of the water-rights to which it is entitled, as rapidly as lands are opened for entry and settlement, it will sell or contract to sell water-rights or shares for land to be filed upon by qualified entrymen or purchasers without preference or partiality other than that based upon priority of application; it being understood, however, that priority of application or priority
183 of entry or settlement shall not give any priority of right to the use of water flowing through the canal against subsequent purchasers, but shall entitle the purchaser to a proportionate interest only therein—the water-rights having been taken for the benefit of the entire tract of land to be irrigated by the system.

After further agreement on the part of the construction company to sell or cause to be sold a water-right or share in the canal for each and every acre filed upon or purchased from the state or acquired from the United States, it is stipulated that each of said shares or water-rights shall represent a carrying capacity in the canal sufficient to deliver water at the rate of one-hundredth of a cubic foot of water per acre per second—each share to represent a proportionate interest in the canal or irrigation works, together with all rights and franchises therein, based upon the number of shares finally sold in said canal; said shares or interests to be sold to persons filing upon the lands at a price not exceeding $40.00 per share, to be paid in installments as

specifically set forth. It is stipulated that in no case shall water-rights or shares be dedicated to any lands before mentioned or sold beyond the carrying capacity of the canal or in excess of the appropriation of water therefor.

It is further stipulated that the sale of water-rights to the purchasers shall be a dedication of the water to the lands to which the same is to be applied.

This recital comprehends sufficiently for the present in-
184 quiry the material stipulations on the part of the construction company.

Under the act of Congress of June 11, 1896 (29 Stat. 434), a state is authorized to create a lien or liens upon lands granted under the Carey act to the state, which liens when created are declared to be valid on and against the legal subdivisions of land reclaimed for the actual cost and necessary expenses of reclamation and reasonable interest thereon from the date of reclamation until disposed of to actual settlers.

The State of Idaho has provided by law that any company furnishing water for any tract of land shall have a first and prior lien on the water-right and land upon which the water is used for all deferred payments for said water-right, the lien to remain effective until the last deferred payment for the water-right is paid and satisfied according to the terms of the contract. Sec. 3019 Idaho Statutes 1919.

By the contract with the settler, the purchaser agrees that upon default in payment of installments, interest, etc., the company may declare the entire purchase-price for the water due, and may proceed to collect the same and to enforce any lien it may have upon the water-rights or the land. He also covenants to set over by way of mortgage to the company, to secure the payment of the amounts due or to become due on the purchase-price for the water-right, any and all interest and all rights which he now has or which may hereafter accrue to him under his contract with the state for the purchase of the lands to which the water-rights are dedicated; and, for
185 further assurance, to execute a mortgage to the company to tract. The contract sets forth specifically the payments made and to be made, the time of payment, and the interest agreed upon.
and to be made, the time of payment, and the interest agreed upon.

Provision is made by state law authorizing the owner or holder of these liens to foreclose the same on account of default in discharging any of the deferred payments. Sec. 3021 Idaho Stat. 1919. And it is further provided that, in the event the owner or holder or occupant of the premises upon which the water has been purchased or contracted for has not at the time of the filing of the claim of lien received title to the premises so occupied or held by him, the proceeding to foreclose shall relate only to the water or water rights. Sec. 3045.

It is also provided, by section 3004, that, should it appear to the department of reclamation that the water supply of the construction company is inadequate to irrigate properly and sufficiently the lands so proposed to be irrigated, or that water-rights have been sold to the

full carrying capacity of the ditch or canal, or in excess of the actual appropriation or of the supply of water made actually available, the department of reclamation shall have the right to enter an order forbidding the parties from making any further or additional sales of water-rights or of shares of stock in any company representing or evidencing water-rights, etc.

It appears from the bill of complaint that the construction company entered into settlers' contracts covering approximately
186 73,000 shares, representing a supply of water to that number of acres under the project; that the state board thereafter, in the exercise of its supervisory control, cancelled and annulled entries of approximately 13,000 acres, and accordingly reduced the acreage entitled to water and the number of outstanding shares in the system to approximately 60,070.8, and declined to approve other contracts; that it later made an order that the water available should be made appurtenant to approximately 35,000 net irrigable acres, and no more. By a stipulation of the parties to this suit, it appears that the general government has issued patents to the state for lands under the project covering 35,000 acres, and declines to issue patent for additional acreage.

By reference to the opinion recently rendered by this court in the case of Twin Falls Salmon River Land & Water Co. et al. v. A. E. Caldwell, et al., No. 3502, it will be seen that the learned trial judge found as a conclusion of fact that the system would not in an average year furnish water to the farmers in excess of 56,500 acre feet on a fair estimate, and that this estimate, distributed on a basis of 2¼ acre feet per acre, would reduce the irrigable area to 24,214 acres, instead of 35,000 as found by the state board upon the advice of the Commissioner of the General Land Office, and accordingly entered a decree which recites in effect, among other things, that the rate of 2¼ acre feet per acre per season, the amount that is and will continue to be required for the reasonably successful production of crops, is less than one-hundredth of a second foot per acre
187 flowing continuously during the irrigating season, and, as a deduction from still other recitals, that the system can be relied upon to furnish 40 per cent, and no more, of the water which the defendant company by its outstanding contracts agrees to sell and deliver, namely, 140,396 acre feet per season.

So here it will be seen that, by the order of the state board, there has been a constant and continuous reduction of the irrigable area that can be supplied with water from the project in quantity sufficient to meet the demands of practicable husbandry. And it may be remarked that the plaintiff by its complaint seems not to challenge specifically the power of the state board to make such delimitations from time to time, governed by the water supply which the company is able to make available for irrigation purposes under the project. In addition, the findings of the learned trial judge indicate that the water supply available is adequate to irrigate properly but 24,214 acres.

It is obvious that many persons, that is, contract-holders, are and will necessarily be affected by the inadequacy of the water supply

considered in relation to the amount that it was at first supposed could be made available. They are affected in several ways. Some will and can get no water at all, as their holdings are entirely outside of the reduced delimitations. Others, and a major portion of them, perhaps all, will be required to take and accept fewer acre feet per acre of water than they have contracted for, and some are
188 bound to be affected in ways not now apparent by the readjustment of the water supply to the delimited area. Then there is the contention of the plaintiff that all the water users who will finally be entitled to water must be required to pay, not $40.00 per share for each share or interest in the system, but $60.00, and a greater sum according as the acreage subject to irrigation from the system is reduced by delimitations made, or that will of necessity be required to be made, to meet the inadequacy of the supply of water available for irrigation purposes.

It is the very theory and purpose of the bill of complaint, as becomes apparent from a reading of it, to enforce the alleged lien for the larger amount so as to require the deminished area to bear the burden of the entire cost of construction.

It is obvious, therefore, that in a comprehensive, equitable and fair readjustment of the matters pertaining to the unfortunate situation, all the contract-holders will be affected in a greater or less degree, and that the rights of each shareholder are more or less dependent upon the rights of every other shareholder. This manifestly and necessarily will affect in greater or less degree the extent and dignity of the rights and holdings of a very great number, if not all of the contract-holders of shares under the project. So it would appear that a final decree cannot be made or entered in the case at bar without affecting materially perhaps all the contract-holders in the project, or at least without leaving the controversy in such condition that its final determination may be wholly inconsistent
189 with equity and good conscience. The suit, considered in respect to the correlative rights involved, is not one for foreclosure merely, but by nature resembles more nearly one for specific performance, the termination of which will perforce of its very consequences affect in some measure all the contract-holders by reason of the inability of the construction company fully to perform on its part.

This result has been practically reached by the decision of this court in Twin Falls Salmon River Land & Water Company, et al. v. Caldwell, supra.

True it is that the state statute has made provision whereby the construction company is entitled to foreclose its liens, but it does not comprehend a situation such as is presented in the present controversy. It is also true that the case of Twin Falls Oakley Land & Water Company v. Martens et al., No. 3478, recently decided by this court, was one for the foreclosure of like liens. The question here presented was not there suggested, but an expression of the court in the opinion rendered indicates by clear enunciation one difficulty attending the litigation. Referring to unpatented lands included in the scheme, the court says:

"Many entrymen upon these lands have improved them and, at least until after full opportunity is afforded such entrymen for hearing, we are not ready to say that where they have complied with the law they are to be put in a position where all the water must go to patented lands, and that their lands may be rendered useless and their claim of vested rights ignored."

It is settled that the lien of the construction company can only extend to the acreage for which it furnishes an adequate quantity of water. Twin Falls Salmon River Land & Water Co. v. Davis et al., 267 Fed. 382.

190 Considering the confusion and complexity of the situation and the interdependent relations of the share-holders, and the difficulty of rendering the fair and exact justice that equity and good conscience rightfully demand, we are of the opinion that the learned trial judge properly directed that all shareholders be made parties to the proceeding. The requirement not having been complied with, there was no error in dismissing the bill.

Affirmed.

Endorsed: Opinion. Filed May 16, 1921. F. D. Monckton, Clerk, by Paul P. O'Brien, Deputy Clerk.

191 United States Circuit Court of Appeals for the Ninth Circuit.

No. 3625.

COMMONWEALTH TRUST COMPANY OF PITTSBURG, a Corporation, Trustee, Appellant,

vs.

MAX SMITH and MARGARET SMITH, Appellees.

Appeal from the District Court of the United States for the District of Idaho, Southern Division.

Decree.

This Cause came on to be heard on the Transcript of the Record from the District Court of the United States for the District of Idaho, Southern Division and was duly submitted.

On Consideration Whereof, It is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court in this cause be, and hereby is affirmed, with costs in favor of the appellees and against the appellant.

It is further ordered, adjudged and decreed by this Court, that the appellees recover against the appellant for their costs herein expended, and have execution therefor.

[Endorsed:] No. 3625. United States Circuit Court of Appeals for the Ninth Circuit. Commonwealth Trust Company of Pittsburg, a Corporation, Trustee, vs. Max Smith and Margaret Smith. Decree. Filed and Entered May 16, 1921. F. D. Monckton, Clerk, by Paul P. O'Brien, Deputy Clerk.

192 At a stated term, to wit, the October term, A. D. 1920, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the city and county of San Francisco, in the State of California, on Monday, the first day of August, in the year of our Lord one thousand nine hundred and twenty-one.

Present:

The Honorable William W. Morrow, Circuit Judge, Presiding.
The Honorable William H. Hunt, Circuit Judge.

No. 3625.

COMMONWEALTH TRUST COMPANY OF PITTSBURG, a Corporation, Trustee, Appellant,

vs.

MAX SMITH and MARGARET SMITH, Appellees.

Order Denying Petition for Rehearing.

On consideration thereof, and by direction of the Honorable William B. Gilbert, and William H. Hunt, Circuit Judges, and the Honorable Charles E. Wolverton, District Judge, before whom the cause was heard, it is Ordered that the Petition, filed June 14, 1921, on behalf of the appellant for a rehearing of the above-entitled cause be, and hereby is denied.

193 (Title of Court and Cause.)

Petition for Appeal.

The above named appellant, Commonwealth Trust Company of Pittsburgh, Trustee, respectfully shows that the above entitled cause is now pending in the United States Circuit Court of Appeals for the Ninth Circuit, and that a judgment was therein rendered on the 16th day of May, 1921, affirming the decree of the District Court of the United States for the District of Idaho, Southern Division, against this appellant, and that thereafter, to wit, on the 14th day of June, 1921, your appellant filed a petition for rehearing in said cause with the Clerk of said Circuit Court of Appeals, which petition was in due form and filed within the time required by the rules of said Court, and which petition was thereafter, to-wit, on the 1st day of August, 1921, denied and overruled by said Circuit
194 Court of Appeals; that the matter in controversy in said suit exceeds One Thousand ($1,000.00) Dollars besides costs; that

this cause is one in which the judgment or decree of the Circuit Court of Appeals for the Ninth Circuit is not final and that it is a proper cause to be reviewed by the Supreme Court of the United States on Appeal.

And this appellant conceiving itself aggrieved by the decree so made and entered in this Court in said cause, does hereby appeal from said judgment and decree to the Supreme Court of the United States, and it prays that this appeal may be allowed and that a transcript of the record and proceedings in said cause, with all things concerning the same, duly authenticated, may be sent to the Supreme Court of the United States, in order that the errors complained of in the assignment of errors herewith filed may be reviewed, and, if error be found, corrected according to the laws and customs of the United States.

(Sgd.) RICHARDS & HAGA,
Attorneys for Appellant.

Residence: Boise, Idaho.

[Endorsed:] Petition for Appeal to Supreme Court U. S. Filed October 15, 1921. F. D. Monckton, Clerk.

195 (Title of Court & Cause.)

Assignment of Errors.

The above named appellant, Commonwealth Trust Company of Pittsburgh, Trustee, in connection with its petition for appeal herein, presents and files therewith its Assignment of Errors, as to which matters and things it says that the decree entered herein on the 16th day of May, 1921, and the order of said Court overruling and denying this appellant's petition for rehearing on the 1st day of August, 1921, are erroneous and unjust to this appellant and particularly in this:

1. That the Court erred in not determining as a matter of law, without first requiring appellant to add upwards of twelve hundred additional parties defendant in this suit, whether appellant was entitled to recover as against the appellees "the actual cost and necessary expenses of reclamation and reasonable interest thereon"
196 as provided under section 4 of the Act of Congress approved August 18, 1894, entitled, "An Act making appropriations for sundry civil expenses of the Government for the fiscal year ending June 30, 1895, and for other purposes," (28 Stat. 372-422) and the amendment thereto approved June 11th, 1896 (29 Stat. 413-434), commonly known as the Carey Act, in a suit to foreclose the lien authorized by said Acts of Congress.

2. That the Court erred in not deciding as a matter of law, without first requiring appellant to add upwards of twelve hundred parties defendants in this suit, whether the determination and order of the Secretary of the Interior under the said Acts of Congress, that the water supply available for the irrigation system described in the

bill of complaint was sufficient only for the reclamation of thirty-five thousand acres, and in issuing patent from the United States to the State of Idaho for said acreage, excluded the remaining Carey Act lands under said project from participation in the water supply available for said project, and which the Secretary determined was sufficient only for the reclamation of the lands so patented to the State of Idaho.

3. That the Court erred in not holding, deciding and decreeing that appellant's bill of complaint for the foreclosure of the lien authorized under the said Acts of Congress against the lands of appellees stated a cause of action, and that the relief prayed for could be granted, and the amount due from appellees to appellant determined without bringing before the Court as parties defendant in this suit all parties and persons having any interest whatsoever in other lands under said project or irrigation system.

197 4. That the Court erred in not holding, deciding and decreeing that the decision and determination of the Secretary of the Interior as to the lands that should be reclaimed from said irrigation system was final, binding and conclusive upon the Court, and in not holding that the available water supply for said project should be distributed and made appurtenant to the lands which the Secretary of the Interior in the exercise of his discretion under said Acts of Congress set aside and patented to the State of Idaho to be reclaimed from said irrigation system.

5. That the Court erred in not holding, deciding and decreeing that appellees were entitled only to their proportionate share or part of the water available for the reclamation of the lands in said irrigation project, based either upon the decision and determination of the Secretary of the Interior made when the lands were segregated, under said Acts of Congress, from the public domain for reclamation from said irrigation system, or based upon the decision and determination of the Secretary of the Interior when patent was issued for approximately 35,000 acres of the lands so segregated, and by which decision the Secretary held and determined that the available water supply was sufficient only for said acreage, and that the other lands segregated should be relinquished to the Federal Government and should not be reclaimed from said irrigation system or participate in the water supply set aside for said irrigation project.

6. That the Court erred in not holding and deciding that the amount due from the appellees to appellant could be determined in this cause without the presence of any other parties.

198 7. That the Court erred in holding and deciding that in foreclosing the lien authorized by said Acts of Congress against any land owner in default it would be necessary to make defendants in such suit all parties claiming any interest in other lands under said project, although plaintiff in such suit had no cause of action or grievance against such other land owners.

8. That the Court erred in disregarding the force and effect of the action of the Secretary of the Interior in issuing patent to the State of Idaho for certain lands to be reclaimed from said irrigation system and declining to issue patent for any other lands but required the State to relinquish the remaining lands to the Federal Government.

9. That the Court erred in assuming as the basis of its decision that the lands patented by the Secretary of the Interior for reclamation from said irrigation system and the lands restored to the public domain and which the Secretary declined to patent to the State of Idaho, were equally entitled to share in the water supply which the Secretary had approved and set aside for the reclamation of the lands patented.

10. That the holding of the Court that appellant could not foreclose its lien against any land without making all land owners, judgment creditors and lien claimants, having no interest in the lands upon which plaintiff sought to foreclose its lien, parties defendant, is a denial of justice and imposes upon plaintiff an unreasonable and improper burden.

11. That the Court erred in not holding and deciding that if there was any necessity for bringing into this case other land owners or parties having any interest in other lands, such parties could be brought in by representation or a class suit under Equity Rule No. 38.

199 12. That the Court erred in holding that Section 3045 of the Idaho Compiled Statutes had any application to this case as said section applies only to the lien for maintenance charges which the Salmon River Canal Company would be authorized to collect, and the same has no application to the lien under the said Acts of Congress or the laws of the State of Idaho supplemental to said acts and accepting the terms and provisions thereof.

13. That the Court erred in not holding and deciding that under Section 3018 of the Idaho Compiled Statutes, which provides that "the water rights to all lands acquired under the provisions of this chapter shall attach to and become appurtenant to the land as soon as title passes from the United States to the State", the available water for said project became appurtenant to the lands patented and could not be diverted to and used upon the lands which the Secretary declined to patent and which were relinquished to the Government and released from the segregation made under the said Acts of Congress.

14. That the Court erred in not reversing the decree of the trial court dismissing appellant's bill, and in not remanding said cause to the trial court with directions to overrule the motion of defendants and proceed with the trial of the case.

15. That the Court erred in assuming as a basis of its decision that the Twin Falls Salmon River Land and Water Company could enter into valid contracts for the sale of water rights after it had sold and exhausted its available water supply.

200 Wherefore, appellant prays that the decree of the Circuit Court of Appeals and of the Trial Court be reversed and set aside and the cause remanded with directions to overrule the motions of appellees and proceed with the trial of the case on the merits.

(Sgd.) RICHARDS & HAGA,
Attorneys for Appellant.

[Endorsed:] Assignment of errors on appeal to Supreme Court U. S. Filed October 15, 1921. F. D. Monckton, Clerk.

201 (Title of Court & Cause.)

Order Allowing Appeal.

It is hereby ordered, that the appeal in the above entitled case to the Supreme Court of the United States be and is hereby allowed as prayed.

Dated this 15th day of October, 1921.

(Sgd.) WM. B. GILBERT,
United States Circuit Judge, Ninth Circuit.

[Endorsed:] Order allowing appeal to Supreme Court U. S. Filed October 15, 1921. F. D. Monckton, Clerk.

202 United States Circuit Court of Appeals for the Ninth Circuit.

No. 3625.

COMMONWEALTH TRUST COMPANY OF PITTSBURGH, a Corporation, Trustee, Appellant,

vs.

MAX SMITH and MARGARET SMITH, Appellees.

Bond on Appeal.

Know all men by these presents, that we, Commonwealth Trust Company of Pittsburgh, Trustee, as principal, and American Surety Company of New York, a corporation organized and existing under and by virtue of the laws of the State of New York, as surety, are held and firmly bound unto Max Smith and Margaret Smith in the sum of Five Hundred ($500.00) Dollars for the payment of which well and truly to be made to the said Max Smith and Margaret Smith, appellees in the above entitled cause, we bind ourselves and each of our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 11th day of October, 1921.

The condition of this obligation is such, that

203 Whereas, the above named Commonwealth Trust Company of Pittsburgh, Trustee, has prosecuted an appeal to the Supreme Court of the United States to reverse the judgment and decree of the United States Circuit Court of Appeals for the Ninth Circuit, made and entered in the above entitled cause;

Now, therefore, if the said commonwealth Trust Company of Pittsburgh shall prosecute its said appeal to effect and shall answer all damages and costs if it fails to make its said plea good, then this obligation shall be void, otherwise to remain in full force and effect.

In witness whereof, the said parties have caused their names to be hereunto subscribed and the said surety has affixed its corporate seal the day and year herein above written.

[SEAL.] COMMONWEALTH TRUST COMPANY OF PITTSBURGH,
Trustee,
Principal,

(Sgd.) By RICHARDS & HAGA,
Its Attorneys.

AMERICAN SURETY COMPANY OF NEW YORK,

(Sgd.) By BRADLEY SHEPPARD,
Resident Vice-President.

Attest:

(Sgd.) McKEEN F. MORROW,
Resident Assistant Secretary.

The foregoing bond approved as to form and sufficiency this 15th day of October, 1921.

(Sgd.) WM. GILBERT,
United States Circuit Judge.

204 *Authority of Signers for Surety.*

Extract from the Record Book of the Board of Trustees of the American Surety Company of New York.

The first meeting of the Board of Trustees of the American Surety Company of New York, after the annual Stockholders' meeting, was held at the office of the Company, No. 100 Broadway, New York City, on Tuesday, January 18, 1921, at twelve o'clock noon.

"The Secretary read the report of the Nominating Committee as follows:

"To the Board of Trustees, American Surety Company of New York.

"GENTLEMEN:

"The Committee appointed by the Executive Committee of this Company, at their meeting held Tuesday, November 30, 1920, for the purpose of nominating * * * Officers of the Company,

* * * for the ensuing year and until their successors are elected, beg leave to report as follows:

"We nominate for * * *

Place	Resident vice-presidents.	Resident assistant secretaries.
Boise City, Idaho.	Bradley Sheppard.	J. H. Richards.
	F. F. Johnson.	O. O. Haga.
	Crawford Moore.	Chas. Kahn.
	Leo J. Falk.	McKeen Morrow.
	Harry N. Falk.	

* * * * * * *

"Whereupon, it was

"Resolved, That the Secretary be authorized to cast one ballot on behalf of the Trustees present, for the members of the Executive Committee, Finance Committee, Committee on Accounts, Committee on Capital Box, Officers and Counsel, as recommended by the Nominating Committee for the ensuing year and until their successors are elected; which was done, and thereupon the aforementioned persons were declared to have been unanimously elected to their respective offices for the ensuing year and until their successors are elected.

"The following resolution was adopted:

"Resolved, That the Resident Vice Presidents be and they hereby are, and each of them is hereby, authorized and empowered to execute and to deliver and to attach the seal of the Company to any and all obligations for or on behalf of the Company, such obligations, however, to be attested in every instance by a Resident Assistant Secretary."

* * * * * * *

STATE OF NEW YORK,
County of New York, ss:

I, M. P. Coughlin, Assistant Secretary of the American Surety Company of New York, do hereby certify that I have compared the foregoing extracts and transcripts, from the Record Book of the Board of Trustees of the American Surety Company of New York, with the original record of said Board, and that the same are correct extracts and transcripts therefrom as they appear of record and are set forth and contained in said Record Book; and I further certify that I have compared the foregoing resolutions with the originals thereof, as recorded in the Minute Book of said Company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original resolutions; and that the said resolutions have not been revoked or rescinded.

Given under my hand and the seal of the Company, at the City of New York, this 19th day of January, 1921.

[SEAL.] (Sgd.) M. P. COUGHLIN,
Assistant Secretary.

[Endorsed:] Bond on appeal to Supreme Court U. S. Filed October 15, 1921. F. D. Monckton, Clerk.

205 (Title of Court and Cause.)

Certificate of Clerk U. S. Circuit Court of Appeals to Transcript of Record upon Appeal to the Supreme Court of the United States.

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing Two Hundred and Four (204) pages, numbered from and including 1 to and including 204, to be a full, true and correct copy of the record under Rule 8 of the Supreme Court of the United States, in the above-entitled cause, including the Assignment of Errors on Appeal to the Supreme Court of the United States and of all proceedings had, and of all papers, including the Opinion filed in the said Circuit Court of Appeals in the above-entitled case, made pursuant to request of counsel for the appellant, as the originals thereof remain on file and appear of record in my office, and that the same constitutes the transcript of record upon appeal to the Supreme Court of the United States in the above-entitled cause.

Attest my hand and the seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 2d day of November, A. D. 1921.

[Seal of the United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,
Clerk,
By PAUL P. O'BRIEN,
Deputy Clerk.

206 (Title of Court and Cause.)

Citation on Appeal to the Supreme Court of the United States.

To Max Smith and Margaret Smith, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States in the City of Washington, within sixty days from the date of this writ, pursuant to an appeal, duly allowed by the Circuit Court of Appeals for the Ninth Circuit, wherein the Commonwealth Trust Company of Pittsburgh, Trustee, is appellant and you are appellees, to show cause, if any there be, why the decree rendered against the said appellant, as in said appeal mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

207 Witness The Honorable, William B. Gilbert, United States Circuit Judge for the Ninth Circuit, this 15th day of October, A. D. 1921.

WM. B. GILBERT,
United States Circuit Judge, Ninth Circuit.

Service of the foregoing Citation and receipt of a copy thereof admitted this 19th day of October, 1921.

TURNER K. HACKMAN,
Attorney for Appellees.

208 [Endorsed:] Docketed. No. 3625. United States Circuit Court of Appeals for the Ninth Circuit. Filed Oct. 25, 1921. F. D. Monckton, Clerk. Richards & Haga, Boise, Idaho.

209 In the Supreme Court of the United States, October Term, 1921.

No. 636.

COMMONWEALTH TRUST COMPANY OF PITTSBURGH, a Corporation, Trustee, Appellant,

vs.

MAX SMITH and MARGARET SMITH, Appellees.

Præcipe Designating Parts of Record Which Appellants Deem Necessary for the Consideration of said Cause on Appeal.

To the Clerk of the Supreme Court of the United States:

Please be advised that appellant, relying upon the Assignment of Errors heretofore filed in said cause, in connection with their petition for appeal, do not deem it necessary for the consideration of said appeal that the printed record should include more than the papers and parts of the record designated below, and you will,

210 therefore, please include in such transcript of record the following, and no other, papers or exhibits, to wit:

(1). Bill of Complaint commencing at the top of page 7 of the printed transcript and ending at the bottom of page 29.

(2). Answer of defendants commencing at the top of page 30 of the printed transcript and ending at the bottom of page 140, omitting, however, the nine blank line between "to wit" and "section" on page 135.

(3). Motion for restraining order commencing on page 143 and ending on page 144.

(4). Decisions and orders of Judge Dietrich commencing with the words "Memorandum Decision" on page 144 and ending at the bottom of page 157.

(5). The proceedings had in the United States Circuit Court of Appeals as shown by the certified record filed with the Clerk of the Supreme Court.

(6). Petition for appeal to the Supreme Court of the United States from the decision of the Circuit Court of Appeals, and all papers filed in connection with such appeal, viz: Order Allowing Appeal, Assignment of Errors, Undertaking on Appeal, Citation and service thereof.

(7). In all papers referred to in the preceding paragraph (6) omit the title of the case and insert in lieu thereof "(Title of Court and Cause)."

211 Dated this 8th day of December, 1921.

RICHARDS & HAGA,
Solicitors for Appellant.

Residence: Boise, Idaho.

Service of the foregoing Præcipe and receipt of a copy thereof admitted this 19th day of December, 1921.

TURNER K. HACKMAN,
Solicitors for Appellees.

212 [Endorsed:] 636—2859. In the Supreme Court of the United States. Commonwealth Trust Company of Pittsburgh, a Corporation, Trustee, Appellant, vs. Max Smith and Margaret Smith, Appellees. Præcipe Designating Parts of Record Which Appellants Deem Necessary for the Consideration of said Cause on Appeal. Richards & Haga, Boise, Idaho.

213 [Endorsed:] File No. 28591. Supreme Court U. S., October Term, 1921. Term No. 636. Commonwealth Trust Company of Pittsburgh, Appellant, vs. Max Smith et al. Designation by appellant of parts of record to be printed and proof of service. Filed December 27, 1921.

Endorsed on cover: File No. 28591. U. S. Circuit Court Appeals, 9th Circuit. Term No. 636. Commonwealth Trust Company of Pittsburgh, appellant, vs. Max Smith and Margaret Smith. Filed December 6th, 1921. File No. 28591.